MISSISSIPPI LAW JOURNAL

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Current subscription: $35.00 per year. Single issue: $12.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends a notice of termination.

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Citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (18th ed. 2005).

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MISSISSIPPI LAW JOURNAL

PUBLISHED BY STUDENTS AT THE
UNIVERSITY OF MISSISSIPPI
SCHOOL OF LAW

VOLUME 75 SPECIAL EDITION NUMBER 3

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Mississippi Law Journal

**Published by Students at the
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VOLUME 75 SPECIAL EDITION NUMBER 3

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FOREWORD

Thomas K. Clancy[*]

The National Center for Justice and the Rule of Law,[1] which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system. Its purpose is to promote the two concepts comprising the title of the Center. The concept of "justice" appeals to basic notions of equality, equity, and fairness, often with an emotive component. In contrast, the phrase "rule of law" refers to the requirement that certain procedures and principles must be followed in each case to reach a correct result. Neither concept is sufficient; rather, both must be utilized to ensure that the criminal justice system fulfills its function in society. The Center implements its mission through projects, conferences, educational programs, and publications that examine important criminal law and procedural issues.

Based on my experiences in law school, I decided that I wanted to be an appellate attorney, specializing in criminal cases. Exactly how I came to that decision is now lost to a poor memory. After graduation, it should not have been a surprise to me that no one was prepared to hire me for such a

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[*] Director, National Center for Justice and the Rule of Law, and Visiting Professor, University of Mississippi School of Law. J. D., Vermont Law School; B.A., University of Notre Dame.

[1] The National Center for Justice and the Rule of law is supported by Grant No. 2000-DD-VX-0032, awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles produced for this symposium are those of the authors and do not represent the official position of the United States Department of Justice.

position fresh out of law school. Yet, I found a way. I learned that the District of Columbia Court of Appeals would appoint counsel to represent indigents on appeal of their criminal convictions. So did the federal appellate courts. After several years, I switched sides and went to work for the Criminal Appeals Division of the Attorney General's Office for the State of Maryland, where I wrote briefs and argued cases for a decade. In all, I have written approximately 900 briefs and have had oral arguments in hundreds of cases in six or seven different appellate courts.

I learned some lessons along the way. First, it's a great way to practice law: no messy evidentiary hearings, which means no need for witnesses, crying mothers, etc. When representing those convicted on appeal, you know where your client is—incarcerated. When representing the state on appeal, it's even better—no "client" to worry about; only the broader idea of representing the state's interests. Second, it's a great way to learn the law and how to litigate: you spend your days scrutinizing transcripts and examining legal principles to determine whether error had been committed. Indeed, appellate practice, with its intensive scrutiny of the trial process, is an excellent—if not essential—way for a *trial* lawyer to improve his or her skills. Third, instead of arguing about what the facts are in a trial, you get to argue about what the law is, or better yet, what it *should be*. Very few lawyers get to do this on a regular basis. Fourth, on the government side at least, you get some broader perspective: sometimes its more important to get the court to accept a legal principle as valid than it is to win the case so that "justice" can be done in that case and future ones. Fifth, I learned the importance of ethics and credibility: if you misrepresent facts or legal principles in one case, your credibility is shot with the court and it may never accept you as a reliable advocate in future cases.

I also learned how bad many attorneys are who appear in appellate cases. They do not understand the differences between the function of an appellate court and a trial court. They do not write competent briefs, often failing to properly assess the facts, the issues, and the law. They often miss the

essential functions of oral argument, which is to educate the court about the case and to respond to the court's concerns. In short, they cannot effectively do the job they are supposed to do: represent their client—whether that client is the government or the convicted criminal.

Another lesson learned was that appellate judges almost universally take their job very seriously and try to make sure that reversible errors do not go uncorrected. Perhaps the most difficult barrier to achieving that goal is the poor representation of appellate counsel.

When I interviewed for my current position, a core desire was to insure that a Criminal Appeals Program be instituted. Such clinics do so much that is worthwhile: they help the courts by providing quality written and oral products; they provide effective representation to those convicted of crimes, insuring that rights are protected; they foster meaningful relationships between appellate courts and law schools; they provide students with advanced and intensive training, so the students can be effective advocates after graduation, which is to say that the clinics have a long term impact on the quality of appellate and trial practice; and the programs give appellate courts the option of appointing the clinic as *amicus curie* in appropriate cases, providing service to the courts.

For the University of Mississippi School of Law's program, the Center was fortunate to find Professor Phillip Broadhead, who is an experienced appellate and trial advocate. He shares my belief that such programs are fundamentally important as a component of a law school curriculum. Professor Broadhead has single-handedly developed the Criminal Appeals Program into the outstanding program that it is today.

To promote the development of other appellate clinical programs, the Center has sponsored this symposium issue of the *Mississippi Law Journal*, which contains scholarly articles and commentary reflecting on various aspects of making such clinics successful. Hopefully, the ideas expressed in this symposium will provide insights to law school administrators and clinical educators that help them improve existing programs and that underline the benefits of creating such programs

where they do not exist. The National Center for Justice and the Rule of Law is pleased to be able to contribute this symposium to the field of clinical legal education. I and the Center thank each of the authors, who offer considerable insight into the special place in legal education that appellate advocacy training should have. Finally, I thank and commend Professor Broadhead for his tireless efforts in developing and shepherding this symposium issue from its conception to fruition. Without him, this project would not have been possible.

PERSPECTIVE FROM THE BENCH ON THE VALUE OF CLINICAL APPELLATE TRAINING OF LAW STUDENTS

Ruggero J. Aldisert[*]

Because we face a serious problem of adequate representation of defendants in criminal appeals, it is welcome news that the University of Mississippi School of Law and other institutions are now sponsoring Criminal Appeals Clinics. In 1991, when I was researching for the first edition of my book, *Winning On Appeal: Better Briefs and Oral Argument*,[1] I received views of chief justices of over thirty states and chief judges from United States courts of appeals. Coalescing with my own experience of having been a federal appellate judge since 1968, our views on the general quality of briefs were summarized:

- Too long. Too long. Too long.
- Too many issues or points.
- Rudderless; no central theme(s).
- Failure to disclose the equitable heart of the appeal and the legal problem involved.
- Lack of focus.
- Absence of organization.

Writing a convincing brief does not get you "brownie points" or a star on the forehead. You win the case. Writing a

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[*] Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit. The author, Judge Ruggero J. Aldisert, retains the copyright to this article.

[1] *See* RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT (NITA 2d ed. 2003) (1992). Judge Aldisert has also authored several other books: OPINION WRITING (West Publishing) (1990); THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES (West Publishing 2d ed. 1996) (1976); LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING (NITA 3d ed. 1997) (1988).

bad brief will not send you to sit in the corner of the school room. Instead, you lose the case. It is that simple.

Eleven years later, as I prepared the second edition of *Winning On Appeal*, I solicited comments from nineteen state chief justices, nine United States circuit chief judges and more than a score of other state and federal appellate judges. They made the same dreary complaints that their predecessors expressed more than a decade before. My experience also was unchanged, notwithstanding sitting regularly with the Fifth, Seventh, Ninth and Tenth Circuits, in addition to sitting with the Third Circuit.

I chalk this up to one phenomenon: Too many trial lawyers appear before appellate courts without recognizing that the environment on appeal is a galaxy away from that of the trial courtroom.

On the trial level, the main purpose is to persuade the fact-finder to translate a congeries of testimony and exhibits into rock-bound facts. In these surroundings, the lawyers control the time. Trials are measured in days, weeks and months.

Not so in an appeal. Your principal briefs are limited to about thirty pages or 14,000 words, and ordinarily you only get fifteen minutes to argue your case. Too many lawyers do not realize that more is *not* better on appeal.

What now follows is not a *vade mecum* on how to write a brief, but a sample of observations from one who entered law school in the fall of 1941 and, save for four years with the Marine Corps in World War II, has been involved with law ever since. Today, I am in the rare company of a handful of judges still active after serving on the federal appellate bench for almost forty years. I suggest a small handful of suggestions on how to answer the criticisms of so many appellate judges.

I. The Odds of Reversing the Trial Court

Much is written about the burdens of proof in the trial court, while little is written about the burdens on appeal. A presumption exists on the appellate level that the trial court

committed no reversible error. We see this in those cases where, because of recusals, an appellate court is evenly divided. When this occurs, the judgment of the trial court or the lower appellate court is affirmed.

Using statistics of the United States court of appeals, that generally track any intermediate state appellate court, your chances of getting a reversal are mighty slim pickings.

United States Courts of Appeals Per Cent Reversed in 2004

	All Appeals	*Criminal Cases*
All Circuits	*8.7*	*5.1*
D. C. Circuit	16.5	9.2
First Circuit	12.7	12.3
Second Circuit	1.0	0.8
Third Circuit	12.0	8.5
Fourth Circuit	5.9	3.5
Fifth Circuit	6.8	3.3
Sixth Circuit	9.7	4.6
Seven Circuit	14.8	8.3
Eighth Circuit	9.7	8.6
Ninth Circuit	8.5	5.4
Tenth Circuit	9.5	6.0
Eleventh Circuit	9.4	5.7[2]

The appellant today fights to succeed amid a crushing caseload where about nine out of ten cases are affirmed. In direct criminal appeals, only about one case in twenty is reversed. That is the true reality show that the lay public and trial lawyers do not see.

It all begins with what you write. The written brief has always played an important role in the American appellate

---

[2] Statistics on federal court filings and dispositions are published annually in Director of the Administrative Office of the United States Courts Annual Report, *2004 Annual Report of the Director*, Table B-5 (2004), *available at* http://www.uscourts.gov/caseload2004/tables/B05Mar04.pdf.

court system. By contrast, the English appellate system relies entirely on oral argument. In the American appellate court, oral argument is a fleeting moment. The written brief studied for weeks prior to oral argument is the principal instrument of persuasion.

Putting aside our tradition, the recent astronomical increase in appellate court caseloads emphasizes the importance of briefs and diminishes the grandness of oral arguments. Crushing caseloads have imposed severe restrictions on the time available for oral argument. Notwithstanding many exhortations about the importance of oral argument, in today's appellate environment, you must write to win. Do not depend solely on your powers of speech, regardless of how great they may be. Your hopes hang on the written argument; the oral argument is only a safety net. I constantly emphasize that cases are not won at oral argument; they are only lost there. Accordingly, I will concentrate on brief writing in this Foreword.

My experience in riding the circuits has taught me that if an appeal presents an issue of institutional or precedential significance, oral argument will be granted by the court. Various courts have different procedures through which this decision is reached, but judges seem to err on the side of granting oral argument in unworthy cases, rather than denying the opportunity in deserving cases.

What then are the odds that the judges will grant oral argument in your case? The following records of the United States courts of appeals provide some indication:[3]

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[3] U.S. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS 106-08, Table B-1 (1990); Dir. of the Admin. Office of the U.S. Courts, *2004 Annual Report of the Dir.*, Table B-1 (2004), *available at* http://www.uscourts.gov/judiciary2004/dectables/B01dec04.pdf. Most courts of appeals have screening panels. The percentage argued may differ between those that have screening panels and those that do not. In the Third Circuit, for example, because there is no screening of counseled cases prior to placing cases on the calendar, there will be no oral argument unless a member of the panel requests it.

Circuit	Percentage Argued in 1990	Percentage Argued in 2004
All Circuits	44.97%	30.93%
D. C.	57.40%	48.90%
First	67.58%	49.61%
Second	75.84%	59.52%
Third	27.27%	24.14%
Fourth	37.28%	17.28%
Fifth	30.09%	19.78%
Sixth	49.73%	42.10%
Seventh	56.77%	52.44%
Eighth	42.37%	34.31%
Ninth	49.47%	28.89%
Tenth	36.90%	31.31%
Eleventh	45.03%	19.31%

The comparison of these years illustrates that in the United States courts of appeals a significant development in the judicial process has taken place during the span of a decade and a half. It is a nationwide decline of almost fourteen per cent of cases being argued. There has been a decline in oral argument in every Circuit. On average less than one case in three are now calendared for oral argument. I am informed also by my own experience: judges will no longer vote for oral argument where the law is clear and the application of facts to the law equally plain.

This should be a signal to lawyers that today, more than ever, the appellant's brief takes on a vital and decisive role. You must not only write to persuade the court to reverse the judgment of the district court, but you must meet a threshold burden of demonstrating in your brief that, on the basis of the

proper standard of review, a serious reversible error was committed in the trial court to deserve oral argument. An arguable question of law must be presented.

Crushing Caseloads Per Appellate Judge

2004 Terminations on the Merits

Because these pages represent a "Perspective from the Bench," I pause to reflect on the caseload for each active judge on the United States courts of appeals. I will speak of "then" and "now." In 1969, my first full year as a United States circuit judge, each active judge on my court was responsible for deciding ninety appeals a year. I went to Philadelphia six times a year to hear oral arguments and in each sitting we had to decide fifteen appeals during argument week. The national average was ninety-three appeals per judge per year. That is the "then" part. I turn to the present "now" situation: How many cases must each active United States circuit judge decide each year?

Courts	*Cases per Active Judge in 2004*
All Circuits	432
D. C. Circuit	156
First Circuit	262
Second Circuit	260
Third Circuit	379
Fourth Circuit	522
Fifth Circuit	727
Sixth Circuit	348
Seventh Circuit	349
Eighth Circuit	399
Ninth Circuit	490
Tenth Circuit	254
Eleventh Circuit	711[4]

[4] Dir. of the Admin. Office of the U.S. Courts, *2004 Annual Report of the*

The national average means that each United States circuit judge must decide 432 appeals each year. After deducting Saturdays and Sundays, each judge must decide more than one case each day. The One-a-Day brand was a great name for vitamins, but I doubt that it is equally great in describing the caseload for United States circuit judges. Whether presenting or defending an appeal, your case moves along an assembly line. Think about it. Statistically speaking, judges have less than one day to give the case full treatment: studying briefs; researching the law; perhaps hearing argument; conferencing with colleagues; making the decision; writing a precedential or not-precedential opinion; studying other writers' opinions; and deciding motions and petitions for rehearing. This does not include attending to correspondence and the telephone. That is over one case a day in the highest federal court to which a litigant has a right to take an appeal.

Thus, your appeal faces extreme competition with other appeals in the assembly line. That is "now," the modern day appellate court and I offer suggestions on how to cope with this.

II. Criticisms of Briefs

In presenting a brief summary of criticisms of the briefs in a view from the bench, I chant the mantra of the appellate judiciary: *Briefs are too long, too long, too long*. The litany of criticisms continues: lack of organization; failure to set forth logical progression; excessive citation; verbiage; and rambling statements of fact. Let me now offer some suggestions on how to avoid some of these criticisms.

Dir., Table B-1 (2004), *available at* http://www.uscourts.gov/judiciary2004/dectables/B01dec04.pdf; Federal Court Management Statistics, *U.S. Court of Appeals Judicial Caseload Profile Report* (2004), *available at* http://www.uscourts.gov/cgi-bin/cmsa2004.pl (using the drop-down arrow, click on the corresponding court and follow the link).

A. The First Steps in Writing a Brief

Above all, make certain you have allocated sufficient time to prepare the brief. Do not let it play second fiddle to a series of depositions or other works which may be irrelevant in summary judgment or at trial. Writing a good brief takes time—both in planning what to say as well as expressing your argument effectively.

The first step in the writing process is to make an informal list of the issues that may be included. This is just an inventory. Here, you simply want to brainstorm the issues. The first step is not to use editorial or jurisprudential judgment. You simply make a list of all possible issues about which you might write. Put down every conceivable argument. This is only the beginning. Unfortunately, too many lawyers consider it the end as well. They make that list and then indiscriminately write a brief based on it. *The second step is weeding out issues that do not have a reasonable probability of prevailing in the appellate court.* This may be the most difficult decision you make in writing the brief. It is certainly the most important one. What to exclude is as important as what to include. Here is the test you will use for inclusion: LIMIT THE SELECTION OF ISSUES TO THOSE THAT MORE PROBABLY THAN NOT WILL ATTRACT THE INTEREST OF THE APPELLATE JUDGES AND GENERATE THEIR SERIOUS CONSIDERATION. Note: I did not say issues that *possibly* will stimulate their interest. I said *probably*, which means more likely than not.

Here, you must trade places with the brief reader in black robes. You must be dispassionate, detached and imperturbable. You must also be intellectually disinterested. Put aside emotions and passions, especially when you are representing the appellant. Carefully analyze the issues to ascertain where there is an *arguable* question of law, not simply an *imaginable* one. Do not expect to win by rolling the dice or throwing a handful of issues at the wall and hoping that some will stick.

A successful trial lawyer may mix the good with the bad and still succeed. In your closing speech to a jury, you can toss in a few arguments designed for emotional or populist purpos-

es, or even one or two that smack of prejudice and superstition. You can avoid logic and get away with it. You can use fallacies of emotion and distraction. In examining and cross-examining a witness, you can permit extraneous matters to seep in and you still might get away with it.

The game changes when you walk up the appellate ladder. You cannot afford to *dilute,* or shall I say *pollute*, the good with the bad. One or two perfectly good arguments should not be polluted with superfluous contentions that not only will never get anywhere, but, by their mere presence, will also weaken your good points. This is forensic infection. Bad arguments infect the good.

B. How Many Issues?

Now I come to my personal litmus test, the number of issues in a brief in *all* civil cases and a goodly number of criminal cases.

THREE:	Presumably arguable.	The lawyer is primo.
FOUR:	Probably arguable points.	The lawyer is primo minus.
FIVE:	Perhaps arguable points.	The lawyer is no longer primo.
SIX:	Probably no arguable points.	The lawyer has not made a favorable initial impression. It's all uphill now.
SEVEN:	Presumptively no arguable points	The lawyer is at an extreme disadvantage.
EIGHT OR MORE:	Strong presumption that no point is worthwhile.	

To be sure, this litmus test is arbitrary, yet veteran appellate judges are virtually unanimous in complaining about the unnecessary prolixity of issues raised in most state and federal appeals. Former Chief Justice Malcolm Lucas of California, for example, advised: "[S]pend time on issues with potential merit. Shotgun approaches that do not distinguish between important and insignificant claims weaken your

presentation."[5]

C. A Caveat in State Criminal Appeals

But I rush to a big caveat. In taking state direct criminal appeals, you must consider not only your efforts before the present court. You must keep in mind other possible proceedings–state post conviction remedies and federal habeas under 28 U.S.C. § 2254.[6] Two important considerations hang heavy in state criminal appeals not present in other appeals. First, you must avoid being procedurally defaulted for failing to raise an issue, especially a federal constitutional issue. Second, you must be totally conversant with state law setting forth what is necessary to properly raise an issue, specifically the quantum of discussion required on each point.

Because of the necessity of protecting the record for future proceedings, some of the issues you must perforce present may not comport with the advice regarding the limited number of issues and the extent and quality of the discussion in the make-or-break issues in the present appeal. With an eye to the possibility of raising federal constitutional issues in a later Section 2254 proceeding in a United States district court, you have a twofold responsibility: to insure that (1) you have exhausted all federal constitutional issues in the state court system, the Open Sesame to the federal courthouse door; and (2) you were not procedurally defaulted in the state judicial system from raising them there. Every lawyer practicing in a state or federal criminal court must be well-versed in that branch of federal constitutional law governing criminal law proceedings—from the start of a police investigation to filing a brief in the appellate courts.

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[5] ALDISERT, WINNING ON APPEAL, *supra* note 1, at 123 (quoting former Chief Justice Malcolm Lucas).

[6] 28 U.S.C. § 2254 (2000).

D. The First Impression

You have limited the arguments to the points that are generally arguable issues. Your task now is to make a good first impression. In writing a brief, you do not get a *second chance* to make a *good first* impression. Always keep in mind the monstrous load of cases facing the judge. Your brief is capable of generating different first impressions. The judge may look at it and say, "Hey, this lawyer really knows the score. This lawyer has something here." That is the effect you want to make. At the other end of the scale, the impression of the judge may be: "This is what Ernest Hemingway had in mind when he said, 'What this country needs is a good [junk][7] detector.'" In your next brief, the choice is yours.

E. Arrangement of Issues

Lead with your strongest and most important points. Always lead from a position of maximum strength. This strategy requires you to produce an intelligent answer to the following question: What argument, objectively considered, based on precedent and the court's previously-stated policy concerns, is most calculated to persuade the court to your benefit? You want the point to be objectively considered by the court. It is your baby, but do not look at the baby through rose colored glasses. Look at your baby with all its warts and blemishes.

The law does change, but it changes in increments. You are not going to get an intermediate court of appeals to overrule precedent set by the highest court in the judicial hierarchy. Listen to Myron Bright of the United States Court of Appeals for the Eighth Circuit: "If an appellant can't win on the strength of the strongest claim or claims, he stands little chance of winning a reversal on the basis of weaker claims."[8] The court needs to know just where the heart of the appeal

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[7] *See* ALDISERT, WINNING ON APPEAL, *supra* note 1, at 121. Hemingway used another four-letter word. *See id.*

[8] Myron H. Bright, *Appellate Briefwriting: Some "Golden" Rules*, 17 CREIGHTON L. REV. 1069, 1071 (1983).

lies. Distracting attention from arguable issues never helps an appellant's cause.

F. State the Issue Narrowly

State the issue as narrowly as possible. The objective of appellate advocacy is to win the
particular appeal before the court. Do not ask the court to make a decision with molar consequences when all you need is a molecular effect. There is a difference between succeeding as an advocate in a particular case and mounting a white charger to expound a greater cause in which you passionately believe. The law develops incrementally. There are few sea changes. Do not expect the court to change the law drastically in a single case. Write as narrowly as possible in order to win this appeal only.

G. The Statement of Facts

In selecting the facts, the brief writer walks a very tight rope. This job requires consummate skill because you must constantly maintain a balance between being scrupulously accurate and putting the most favorable spin on your version of what happened. Do not steal the facts. Your opponent's brief (or the judge) will expose you. The exceptional advocate weighs these conflicting duties and conveys the impression that his or her client deserves to win.

It is essential that the statement of facts demand and retain the reader's attention. Do not bore the judge. Do not make the narrative difficult to follow. Do not mimic the style of an IRS regulation. Come closer to John Grisham than Beltway bureaucrats. Catherine Drinker Bowen kept a sign posted above her desk to discipline herself as she wrote her Books: "Will the Reader Turn the Page?"

Consider how judges study briefs. Very seldom does the judge read one brief all the way through and then read the other brief completely. What I usually do is first read the appellant's statement of issues to learn what the case is all about and get the flavor of the case. I want to know the per-

imeters of the judicial inquiry. Then I read that portion of the trial court's opinion dealing with those issues. I do not read the whole opinion, merely the facts and that portion of the opinion discussing the issues presented on appeal.

Next, I read the appellant's summary of the argument, and then that of the appellee. And I do all of that before I read the statement of facts in the appellant's brief. I have already looked at the fact finder's rendition of the facts. I know the summary of both arguments. That forms the background before I start reading the facts.

From all this comes one direction to brief writing that absolutely must be followed: *Never write your statement of facts until you have written the statement of issues.* This is an absolute imperative. It is your protection against writing a long-winded, rambling account of facts that will immediately turn off the judge. Keep in mind two concepts that many law clerks call "Aldisertisms:"

> *Learn the difference between that which is important and that which is merely interesting.*
>
> *It isn't unconstitutional to be interesting.*

H. Summary of the Argument

The summary is critical because it gives the reader a concise preview of the argument and, therefore, should be crafted to allow the judge to form a mental outline of his or her pre-argument memorandum. Preparing an effective summary may be the brief writer's most challenging and important task. Former Mississippi Supreme Court Justice James L. Robertson once commented:

> I think the most important part of the brief is the Summary of the Argument. I invariably read it first. It is almost like the opening statement in a trial. From clear and plausible argument summary, I often get an inclination to affirm or reverse that rises almost to the dignity of a (psychologically) rebuttable presumption.

...

> I do not mean to denigrate the importance of a fully developed and technically sound argument. But I read the subsequent argument in a "show me" frame of mind, testing whether it confirms my impression from the summary of the argument.[9]

Professor David W. Burcham, dean of Loyola Law School in Los Angeles, was one of my former clerks who went on to clerk for Justice Byron White and to practice law with a large Los Angeles firm before donning academic robes. He offers these observations: A brief writer should understand that the summary of argument will likely create the first, and perhaps last, impression of the Court toward the legal merits of the client's case. It should be the structural centerpiece of the entire brief.[10]

Finally, I turn to the heart of your brief: the discussion of the issues or points you raise under the rubric of "Statement of Issues."

I. Issue-by-Issue Discussion

You proceed to the argument in a highly compartmentalized, issue-by-issue format. This is not the time for cross-pollination. The statement of your issue should be the argument heading. Use simple declarative sentences; state what you want the court to accept. Tell us this in a simple sentence. You do not have to use a "whether" statement or an interrogatory. If you want to move and influence the court to your way of thinking, set forth the point you want the court to accept in the statement of issues as well as the topic sentence in each one of your sections. Do not be a "whether" man or woman.

FIRST CRITERION: Do not wander, ramble, digress, or become unglued.

SECOND CRITERION: Incorporate the proper standard of review in the topic sentences introducing each point. You must

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[9] James L. Robertson, *Reality on Appeal*, 17 LITIG. 3, 5 (1990).

[10] Series of Informal Telephone Discussions with David W. Burcham, Dean, Loyola Law School (unspecified date).

set forth and remind the reader of the standard of review for each issue presented.

THIRD CRITERION: Determine whether the issues are independent of each other. "If you find on point one, you will then reverse, and it's not necessary to decide point two." The ideal brief contains several independent issues, so that if the court does not agree with you on the first issue, it might agree with you on your second or third. The tough road to hoe is when your points are interrelated, where the conclusion of the syllogism of your first point becomes the major premise for your second point. And the conclusion of your second point becomes the major premise of the third and so on. That's the difficult brief, because if you get whacked on your first point, the court can't go to your second or third point because they are logically prohibited. For example, in a *Miranda* issue, you must prove that the defendant was in custody. Without this proof, every other argument fails. Analyze your issues. Try to avoid an interdependent format by making your issues as independent of each other as possible.

FOURTH CRITERION: Always consider the consequences of each point you make. In considering how the law will affect other cases, appellate courts are always anxious not only about in personam justice between the parties, but also in rem justice. Always contemplate what precedential and jurisprudential institutional results will be forthcoming if the court accepts the conclusion you urge in your brief.

Much advice abounds on how to craft the discussion in your issues. I will now address only one critical part of that undertaking. For a more comprehensive discussion, I refer you to my book, *Winning On Appeal: Better Briefs and Oral Argument*.[11]

J. The Required Logical Form for Each Issue

Although it can be said that formal logic is not an end-in-view of law, it is one of the important means to those ends,

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[11] ALDISERT, *supra* note 1.

perhaps the most important. Logical form and logical reasoning are critical in the judicial process. We all know the "why" of logic in the law. Justice Felix Frankfurter said it best on his retirement after twenty-three years on the Supreme Court: "[F]ragile as reason is and limited as law is as the expression of the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling."[12]

The common law tradition demands respect for logical form in our reasoning. Without it, we are denied justification for arguments before a court. Although logical form is only a means, it forms the most important tools of argument. Logical rules are the implements of persuasion. They form the imprimatur that imparts legitimacy and respect. They are the acids that wash away obscurity in your own argument and expose obfuscation in your opponent's argument.

Logical argument is a means to test the soundness of a purported conclusion. We do this by following well-established precepts of logical order in a deliberate and intentional fashion. Brief writers must follow a thinking process that emancipates us from impulsive conclusions or arguments solely supported by strongly felt emotions or superstitions. John Dewey's advice to teachers in generations past is still vital and important today: Reflective thought "converts action that is merely appetitive, blind, and impulsive into intelligent action."[13]

The purpose of an appellate brief is to persuade a group of highly trained legal professionals. When an argument is presented to judges, it must employ inductive or deductive reasoning and be free from both formal and material fallacies. I now turn to a quick summary of concepts to be employed by brief writers.[14]

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[12] Felix Frankfurter, *Between Us and Tyranny*, TIME, Sept. 7, 1962, at 15.

[13] JOHN DEWEY, HOW WE THINK 17 (Dover Publications 2d ed. 1933) (1910).

[14] I set forth this thesis in detail in my book, LOGIC FOR LAWYERS, by analyzing logic precepts used in the law and illustrating these precepts with excerpts from cases. The reader is directed to that book for a comprehensive study of the topic discussed here. *See* ALDISERT, LOGIC FOR LAWYERS, *supra* note 1.

K. The Required Logical Structure of Each Issue

We now come to the make-or-break part of your brief. It is a formal argument containing a group of propositions in which one follows from the others. An argument is not merely a collection of propositions, but an annunciation with a particular, rather formal structure.

The purpose of a brief is to persuade the court to accept the conclusion you present in the particular issue. You must not do this "in the nude," using the felicitous expression of Loyola Dean David W. Burcham.[15] Do not tell us merely the conclusion you want us to accept. We must also receive the reasons that justify the proffered conclusion. We need this because in accepting your conclusion, we also promulgate a rule of law. Roscoe Pound taught that rules of law "are precepts attaching a definite detailed legal consequence to a definite, detailed state of facts."[16] A rule of law promulgated by a court is valid only to the extent that sound reasoning supports it.

Because reason must always support the conclusion presented for acceptance in the brief, we turn to some basic concepts of legal reasoning that brief writers must use.

L. Concepts of Reasonable, Reasoning, Reasons, Reason[17]

It is necessary to remind ourselves of some elementary, yet indispensable, concepts of logic for lawyers. Involved in the judicial process is an interrelationship among four terms that sound alike, but whose meanings diverge in the decisional process: "reasonable," "reasoning," "reasons" and "reason."

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[15] *See* Burcham, *supra* note 10.

[16] Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482 (1933).

[17] This section sets forth discussion that I first presented in *Aylett v. Secretary of Housing and Urban Dev.*, 54 F.3d 1560 (10th Cir. 1995). I have included this material without quotation marks or citations throughout, although much of the text is directly quoted from *Aylett*. *See Aylett*, 54 F.3d at 1567-68.

1. Reasonable

The court's acceptance, interpretation, and application of a suggested legal precept in the brief involves a value judgment that is justifiable because the court is convinced that its decision is fair, just, sound, and sensible and, therefore, "reasonable."

One judge may believe that it is "reasonable" to maintain the law in harmony with existing circumstances and precedents and accede to the magnetic appeal of consistency in the law; another may assert that the issue should be considered pragmatically and will respond only to its practical consequences. What is "reasonable" in given circumstances may permit endless differences of opinion. This is how it should be. The inevitable varying views found in multi-judge reviewing courts is one of the most vitalizing traditions animating the growth of the law.

2. Reasoning

Determining what is "reasonable" is closely related to the overarching process we call "reasoning," defined as a progression of thought based upon the logical relation between truths. Logical thought is reflective thinking, which may be understood as an "operation in which present facts suggest other facts (or truths) in such a way as to induce belief in what is suggested on the ground of real relation in the things themselves, a relation between what suggests and what is suggested."[18] Reasoning involves recognizing a "link in actual things, that makes one thing the ground, warrant, evidence, for believing in something else."[19] The ability to adjudicate cases depends upon the power to see logical connections between cases and to recognize similarities and dissimilarities in the compared material facts. This means solving a problem by pondering a given set of facts to perceive the relationship among those facts and those in similar cases, thus reaching a logical conclusion.

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[18] Dewey, *supra* note 13, at 12 (emphasis omitted).

[19] *Id.*

3. Reasons

To do this we resort to "reasons." These are the various propositions utilized in the reasoning process. In the judicial review process, deductive reasoning is the centerpiece, and "reasons" constitute the major and minor premises of the categorical syllogism that lead to the final proposition, the conclusion.

4. Reason

The item "reason" is often used as a shorthand expression to describe the validity or cogency of "reasoning" and the truth contained in factual components of "reasons." Applying "reasonableness" to "reason" is an ever-recurring scenario.

Trial judges and reviewing judges always appraise a specific argument from two separate, but related, considerations: (1) from the sole vantage-point of examining the reasoning in the argument to determine whether, in the language of the logician, it is valid or cogent, without at the same time troubling over the truth and falsity of its premises; and (2) from the sole vantage-point of the truth and falsity of its premises, without troubling over the validity or cogency of its reasoning.

Whenever judges appraise an argument to determine whether they ought to accept its conclusion, they perform both of these functions. That is why much time is expended by judges and their law clerks in research prior to the oral argument or the decision-making conference of the judges. Arguments that have both valid or cogent reasoning and true premises are sound arguments. An argument fails to be sound if either: (a) the reasoning it employs from premises to conclusion is not acceptable; or (b) one or more of its premises is false.[20]

M. Introduction to Deductive Reasoning

Deductive reasoning in the law is a mental operation that a student, lawyer, or judge must employ every working day of

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[20] *See Aylett*, 54 F.3d at 1567-68.

his or her life. Formal deductive logic is an act of the mind in which, from the relation of two propositions to each other, we infer, that is we understand and affirm, a third proposition. In deductive reasoning, the two propositions which imply the third proposition, the conclusion, are called premises. The broad proposition that forms the starting point of deduction is called the major premise; the second proposition is called the minor premise. They have these titles because the major premise represents the class; the minor premise represents something or someone included in the class. In appellate advocacy, the subject of the minor premise, what we call the minor term, is the facts found by the fact-finder.

The major premise of the issue usually takes the form of a fresh statute or the rule of law of the court, enunciated in a previous case. This is the precept that should appear as the topic sentence of the discussion of each issue. Your major premise is a detailed legal consequence attached to a detailed set of facts that has previously been promulgated by the Court as ruling case law, and therefore a legitimate precedent.[21] This is exemplified by the traditional major premise in the categorical deductive syllogism: ALL MEN ARE MORTAL. If the major premise is not true, your entire argument fails. All is lost. All the facts you set forth and all citations that follow will not help you.

Your minor premise consists of the facts found by the fact-finder. Your purpose is to show that these previously stated facts come within the broad class of facts subsumed in the major premise. The classic example is: SOCRATES IS A MAN. Your conclusion then will logically follow—SOCRATES IS MORTAL. The bottom line: Be absolutely certain that you accurately state the rule of law which is a detailed legal consequence attached to a detailed set of facts constituting the rule of law that forms the major premise and anchors your entire deductive argument.

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[21] A caveat: As discussed *infra*, sometimes the starting point is not clear, and the brief writer must "find" the law by using inductive generalization to fashion the major premise from a series of rules of law from a series of cases.

N. Deductive Reasoning in the Discussion of Your Issue

I now turn to the major logical framework of the issue you discuss. Although other aspects of logic may be involved in some cases, you will principally utilize what the logicians describe as the categorical deductive syllogism. By this time, you know it by its familiar form:

Major Premise: All men are mortal.
Minor Premise: Socrates is a man.
Conclusion: Socrates is a mortal.

Apply this syllogistic format to the opinion of Judge Cardozo in *MacPherson v. Buick Motor Car Co.*[22]

Major Premise:	Any manufacturer, who negligently c o n - structs an article that may be inherently dangerous to life and limb when so constructed, is liable in damages for the injuries resulting.
Minor Premise:	A manufacturer who constructs an automobile in which the spokes on a wheel are defective is such a manufacturer.
Conclusion:	Therefore, a manufacturer who constructs an automobile in which the spokes on a wheel are defective is liable in damages for the injuries resulting.

The classic means of deductive reasoning is the *syllogism*. Aristotle first formulated its theory and offered this definition: "A syllogism is discourse in which, certain things being stated, something other than what is stated follows of necessity from their being so."[23] He added, "I mean by the last phrase that they produce the consequence, and by this, that no further term is required from without to make the consequence neces-

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[22] 111 N.E. 1050 (1960).

[23] L.S. STEBBING, A MODERN INTRODUCTION TO LOGIC 81 (6th Ed. 1948) (quoting Aristotle in *Anal. Priora* 24B).

sary."[24]

From this concept we can say that a syllogism is a form of implication in which two propositions jointly imply a third. A syllogism must appear in one form or another in almost *every* issue you discuss in your brief. If you do not supply a syllogism and argue only the conclusions, be prepared to answer the question put to you in oral argument by an appellate judge: "Counsel, you are urging that we accept this proposition. Assume that I agree with you. Will you please state for me the premises in syllogism that I must use in writing the opinion in your favor." If you are unable to do this, you are committing forensic suicide.

An argument that is correctly reasoned may be wrong, but an argument that is incorrectly reasoned can never be right.

O. Introduction to Inductive Reasoning

Deductive reasoning and adherence to the Socrates-is-a-man type of syllogism is only one of the major components of the common law logic tradition. Other forms of reasoning may be utilized, especially inductive reasoning. In law logic, it is often used to fashion either the major or minor premise of the deductive syllogism.

In logical analysis, statute, specific constitutional provision, or ruling case law qualifies as the controlling major premise. It is the law of the case in which the facts (appearing in the minor premise) will be compared, so as to reach a decision (the conclusion). Where no clear rule of law is apparent, however, it is necessary, using Lord Diplock's phrase, to draw upon "the cumulative experience of the judiciary"[25] to fashion a proper major premise from existing rules of law found in an assortment of many cases as the specific holdings of those cases. This is done by inductive reasoning, that is, reasoning from particulars to the general.

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[24] *Id.*

[25] *See* United States v. Villegas, 911 F.2d 623, 629 (11th Cir. 1990) (paraphrasing Lord Diplock).

Deductive reasoning moves by inference from the more general to the less general to the particular. Inductive reasoning moves in an opposite form—from particulars to the general or from the particular to the particular.

P. Inductive Generalization

Let us start with an example of inductive reasoning from particulars to the general. We call it inductive generalization, and use again as our example, the All-men-are-mortal major premise. In its general form, this premise has been induced from a process of counting millions of particulars to create a general statement. The world has been inhabited by millions of men. We know all these men to be mortal. Thus, in the inductive syllogism we are able to reach by inductive generalization what becomes the major premise: All men are mortal.

It should be emphasized that the truth of the conclusion drawn from this inductive process is not guaranteed, not even when all the premises are true and no matter how numerous they are. We always run the risk of the informal fallacy of hasty generalization. All we can say, however, is that the creation of a major premise in law by the technique of inductive enumeration, although not guaranteed to produce an absolute truth, does produce a conclusion that is more likely true than not. This process permits the induced general conclusion to be modified as new cases are decided. Formulating a generalization, that is, enumerating a series of tight holdings of cases to create a generalized legal precept, is at best a logic of probabilities. We accept the result, not because it is an absolute truth, like a proposition in mathematics, but because it gives our results a certain hue of credibility. The process is designed to yield workable and tested premises, rather than absolute truths.

Q. Analogy

Analogy is that part of inductive reasoning in which we move from one particular to another particular. A proper analogy should identify the number of respects in which the fact

scenarios in the compared cases resemble one another (positive analogies) and the number of respects in which they differ (negative analogies). Unlike the method of induced generalization by enumeration, numbers do not count in the method of analogy. Instead, what is important is relevancy. And by this I mean the extent to which the compared facts resemble, or differ from, one another in relevant respects.

John Stuart Mill asked the question: "Why is a single instance, in some cases, sufficient for a complete induction, while in others myriads of concurring instances, without a single exception known or presumed, go such a very little way towards establishing an universal proposition? Whoever can answer this question knows more of the philosophy of logic than the wisest of the ancients, and has solved the problem of induction."[26]

Judge Cardozo estimated that at least nine-tenths of appellate cases "could not, with semblance of reason, be decided in any way but one," because "the law and its application alike are plain," or "the rule of law is certain, and the application alone doubtful."[27] This means that applying the process of analogy, the resemblances in the facts in the compared cases are materially similar or identical. I agree that this is a conservative estimate and is not guesswork. Recall again the reversal statistics set forth heretofore.

The case most often presenting an arguable question for decision in the United States Court of Appeals comes within Cardozo's second category, where the law is certain but the application doubtful. Where there is an absolute right of appeal to an appellate court, Cardozo's first two categories form the largest number of counseled appeals. To determine whether the application of facts found by the fact-finder apply to the rule of law, we must perforce compare those facts to those contained in the governing rule of law, and in doing this, we resort to tenets of inductive analogy.

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[26] JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE 206 (8th ed. 1916).

[27] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 164 (1921).

Assume this as the controlling rule of law: Where all facts A, B, and C are present, legal consequence X follows. Assume now that in the case at bar, the facts D, E, and F were found by the fact finder at trial and D, E, and F are materially similar or identical with facts A, B and C. Whether rule X should be attached to facts D, E, and F depends on whether they are materially similar or identical to facts A, B and C.

III. CONCLUSION

I believe that the statistics I have set forth above paint a true picture of today's environment in appellate advocacy. No advocacy program will be complete without a recognition of these stark facts of life in our appellate courts. In these pages I have not attempted comprehensive suggestions for those who participate in the Clinical Appeals Clinics, as students as well as mentors, but I have presented these few suggestions as advice along the way from one who has given much thought to our problems and has had the rare opportunity to have sat regularly in so many different United States Courts of Appeals.

I congratulate Professor Phillip W. Broadhead, Clinical Professor and Director of Criminal Appeals Clinic, National Center for Justice and the Rule of Law at the University of Mississippi. I have enjoyed our telephone conversations that have extended over a year and am honored to participate in this symposium. I congratulate also the professors who are administering similar programs at their universities. You all have made meaningful contributions to the judicial process. You all strike the important chord—to extend optimal training in law school for students to participate in criminal cases. In so doing, you are making a magnificent contribution to one of the highest objectives of our profession—to give maximum protection to those whose lives and liberties are sorely threatened.

On behalf of the state and federal judiciary I thank you for your pioneering efforts.

What I have set forth in the foregoing represents advice of a contemporary. As early as 1851, however, the famed constitutional scholar and prolific writer on the law, Joseph Story, Justice of the United States Supreme Court and Dane Profes-

sor of Law at Harvard, encapsulated all of this in rhyme.

> You wish the court to hear, and listen too?
> Then speak with point, be brief, be close, be true.
> Cite well your cases; let them be in point;
> Not learned rubbish, dark, and out of joint;
> And be your reasoning clear, and closely made,
> Free from false taste, and verbiage, and parade.
> Stuff not your speech with every sort of law,
> Give us the grain, and throw away the straw.
> Whoe'er in law desires to win his cause,
> Must speak with point, not measure our "wise saws,"
> Must make his learning apt, his reasoning clear,
> Pregnant in manner, but in style severe;
> But never drawl, nor spin the thread so fine,
> That all becomes an evanescent line.[28]

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[28] JOSEPH STORY, LIFE AND LETTERS II 89-90 (William Wetmore Story, ed. 1851), *reprinted in* John M. Greaney, *Power of the Pen*, 38 TRIAL 48, 54 (July 2002).

A MODEL PROGRAM FOR ESTABLISHING A 1993 CRIMINAL APPEALS CLINIC AT YOUR LAW SCHOOL: MORE BANG FOR THE BUCK

Phillip W. Broadhead[*]

I. INTRODUCTION

"No [one] can be a complete lawyer by universality of knowledge without experience in particular cases, nor by bare experience without universality of knowledge . . . for the science of the laws, I assure you, must join hands with experience."[1] If this statement in support of instruction of the law by practical experience sounds like a modern-day argument for clinical legal education, then the reader may be surprised to find that the noted English jurist, Sir Edward Coke, made this statement in 1614.[2]

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[1] Leonard D. Pertnoy, *Skills is Not a Dirty Word*, 59 MO. L. REV. 169, 185 (1994) (quoting SIR EDWARD COKE, PREFACE TO A BOOK OF ENTRIES (1614)).

[2] *Id.*

Most, if not all, law schools in the United States today have clinical programs in their courses of study.[3] Many of the leading institutions have diverse clinical course offerings that instruct upper-level law students on skills subjects from taxation to elder law. The popularity of clinical programs has been, in part, driven by the demand of upper-level law students desiring an educational experience that imparts the practical skills that will be immediately useful as they begin their careers, thereby making the law school graduate more "marketable" in seeking that first position with a private law firm, governmental entity, or public interest institution. The study of law has been, in recent decades, viewed "as an academic science with the development of theoretical skills and methodology being the objective of a legal education."[4] However, with the initial scattered institution of clinical courses in the general legal curricula in the 1960s,[5] law schools that had exclusively employed the Socratic, analytic methods of instruction have slowly adapted to the educational activity of "learning from experience."[6]

The clinical approach to legal education allows for a more intense academic experience, as most clinical programs are designed to teach in a "one-on-one" setting with students being responsible for the case of a client whose life or property, in one way or another, hangs in the balance. "Live-client" methodology incites problem-solving to an end of competent and often outstanding representation, providing the student with an incentive to excel in this type of course of study which is not present in other traditional law school lec-

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[3] An informal Internet survey of the home web pages of all of the 166 member law schools of the American Association of Law Schools revealed that all member schools have at least one clinical offering or an externship that is characterized as a clinic in their curricula (the individual web sites visited June 15-17, 2005).

[4] Norman Fell, *Development of a Criminal Law Clinic: A Blended Approach*, 44 CLEV. ST. L. REV. 275, 275 (1996).

[5] Dominick R. Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education*, 50 OR. L. REV. 57, 60 (1970).

[6] William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 467, 467-70 (1995).

ture/examination classes.[7] The goal of this article is to put forth the range of instructional opportunities that a criminal appeals clinic brings to a legal education curriculum in an attempt to persuade other law schools of the value of such programs, thereby inducing them to consider adopting one of the criminal appeals clinic models set out here. The following symposium articles contained in this issue, written by experienced professors in clinical, theoretical, and analytical disciplines, are intended to be viewed as chapters in a "how-to" primer on the day-to-day operations of a criminal appeals clinic. The combined experience will impart a level of cognition of the inherent problems associated with the establishment, functioning, and maintenance of such a clinic.

II. A VERY BRIEF HISTORY OF ANGLO-AMERICAN LAW STUDENT INSTRUCTION

Prior to 1272 A.D., English law consisted of a mix of Roman secular traditions and the canon law of the Catholic Church; the reign of Henry II marked the origination of the English common law for the establishment of a national system of royal courts.[8] Education in the law of Roman and canon law was for centuries based in the oral tradition for use in the practice before the English ecclesiastical courts,[9] and this "spoken word" teaching, based on methods employed by European medieval universities, was eventually adapted to the instruction as to the common law.[10] Although the exact date of creation is lost in antiquity, between 1340 and 1422,[11] edu-

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[7] For an excellent overview of the value of clinical appellate educational experiences in law schools, see J. Thomas Sullivan, *Teaching Appellate Advocacy in an Appellate Clinical Law Program*, 22 SETON HALL L. REV. 1277 (1992).

[8] Paul Brand, *Legal Education in England before the Inns of Court*, *in* LEARNING THE LAW: TEACHING AND THE TRANSMISSION OF LAW IN ENGLAND 1150-1900, at 51, 52-55 (Jonathan A. Bush & Alain Wijffels eds., 1999).

[9] *Id.* at 55.

[10] WILFRID R. PREST, THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS 1590-1640, at 116 (1972).

[11] *See id.* at 1 (asserting the earliest surviving records from the inns are in 1422); Brand, *supra* note 8, at 52 (estimating 1340 was the year the inns were created).

cations in the common law of England began at The Inns of Court, four legal societies in London that for centuries held the "valuable monopoly" of training lawyers for admission to practice before the bar.[12] There, aspiring attorneys lived in residence and were instructed by the "aural" (oral) methodology consisting of scholastic exercises of "case-putting" and "moots" where students argued their interpretation of the law in either informal conferences culminating with a critique by senior members or in elaborate case arguments in the form of a mock trial.[13] Another component of the societies' aural method that rose to prominence in the mid-sixteenth century was "readings," or twice-yearly, daylong formal lectures by leading jurists on selected topics that stretched at times into three weeks.[14] The eventual growth of printed legal literature made the aural method of instruction in the societies all but obsolete by the beginning of the eighteenth century.[15] With the availability of written material on the cases and statutes of the day, the practice of self-education ("two or three years of solitary study" of legal treatises and reporters) came to be expected of all who studied at the Inns of Court, along with the process of creating a "commonplace book," an indexing of short summaries of the legal principles that seemed to be most relevant to the student for easy retrieval later of various precedents relating to different points of law.[16]

Legal education by apprenticeship became popular by the late seventeenth century "because the close supervision which was possible in an attorney's office was regarded as an antidote to the complete lack of guidance given to the student at the inns of court."[17] Unlike the learning experience at the inns, a general education at one of the universities of the day was not considered to be a prerequisite of legal training by apprenticeship, but rather an alternative approach to an edu-

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[12] *See generally* PREST, *supra* note 10, at 50.
[13] *Id.* at 116-19.
[14] *Id.* at 120-24.
[15] *Id.* at 124.
[16] DAVID LEMMINGS, GENTLEMEN AND BARRISTERS 101-03 (1990).
[17] *Id.* at 95.

cation in the law.[18] The universities at Oxford and Cambridge did not seek to establish strong seats of instruction in the law until the mid-nineteenth century, but in 1826, London University was founded and sought to use its strategic location by almost immediately creating chairs in English law and jurisprudence.[19] A legal education by apprenticeship being preferred at that time, the London University program faltered due to low enrollment and a brief revival of the instruction at the Inner Temple and the law institute ensued.[20] By 1854, formal studies in the law were offered at both Oxford and Cambridge, but the societies still held control of admission to the bar; therefore, even if their methods of teaching were in disfavor, their wealth and considerable influence were still very closely held by their institutional hierarchy.[21] There was a debate during this period that the societies should open a legal university, but a question of "the effectiveness of lecturing as a pedagogic technique still remained in doubt during the 1850s."[22] By 1861, the Inns of Court, in an effort to resist government regulation of admission to the bar, instituted a new rule that stated in order to be "called to the bar," a student must have either "attended two courses of lectures in one year," taken an examination for admission, or have been an apprentice in a reputable law office for a year.[23]

In the late nineteenth century, Christopher Columbus Langdell became the dean of the Harvard Law School, and is

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[18] *Id.* at 97-98.

[19] Christopher W. Brooks & Michael Lobban, *Apprenticeship or Academy?: The Idea of a Law University, 1830-1860*, *in* LEARNING THE LAW: TEACHING AND THE TRANSMISSION OF LAW IN ENGLAND 1150-1900, at 353, 359 (Jonathan A. Bush & Alain Wijffels eds., 1999).

[20] *Id.* at 360.

[21] *Id.* at 374-75.

[22] *Id.* at 376. In fact, the authors quote a passage from the *Law Times*, published in 1854, which states, "'Law' . . . 'is not to be taught by Professors, like Mathematics, but can be learned only by actual practice'." *Id.* (quoting 23 LAW TIMES 65 (1854)).

[23] *Id.* at 381-82. The authors illustrate which one of these three options was most disfavored by law students by stating, "It is hardly a matter of surprise that, by the late 1860s, audiences at the lectures had dwindled." *Id.* at 382 (citing 13 SOLICITOR'S JOURNAL 262 (1869)).

best known as the innovator of the "case method" in the institutional study of the law.[24] The "Langdellian" or Socratic methodology of legal education has continued today as the standard for law school classroom instruction on both sides of the Atlantic for more than a century.[25]

Around the turn of the twentieth century, the first law-school based legal aid "dispensaries" began to appear; the first was established at the University of Denver in 1904.[26] Harvard Law School's Legal Aid Bureau began operation in 1913.[27] In 1917, the first scholarship, in the form of a law journal article on the subject of clinical legal education was published, arguing that skills training and practical, experiential learning before graduation from law school was not a waste of resources, but a "necessity."[28] However, law schools continued to resist any form of skills training in their curriculums.[29]

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[24] Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 406 (1971).

[25] *Id.*

[26] Quigley, *supra* note 6, at 466; *see also* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978).

[27] Quigley, *supra* note 6, at 466 (citing Tilford E. Dudley, *The Harvard Legal Aid Bureau*, 17 A.B.A. J. 692 (1931)).

[28] William V. Rowe, *Legal Clinics and Better Trained Lawyers-A Necessity*, 11 ILL. L. REV. 591, 616-18 (1917).

[29] For example,

> In 1921, the Carnegie Foundation for the Advancement of Teaching funded a study on legal education, commonly called the 'Reed Report' after its nonlawyer author, Alfred Z. Reed. The Reed Report identified three components necessary to prepare students for the practice of law: general education, theoretical knowledge of the law, and practical skills training. The emphasis on legal analysis in the casebook method fulfilled only one of these three objectives by providing students with a theoretical knowledge of the law. To satisfy the requirement of a general education component, the Reed Report called for at least two years of pre-law college training—a proposal the ABA promoted, starting in 1921. At that time, not a single state required a university-based law school degree as a precondition for admission to the bar, proprietary law schools were still prevalent, and apprenticeships still provided the basic legal training for many entering the legal profession. In the midst of this highly unregulated climate for entry to the legal profession, the Reed Report's recommendation of practical skills training was not vigorously pursued by law

The debate over the pedagogical value of clinics continued and then in 1933, an important call for the creation of legal clinics to impart practical skills went out to the law schools of the day;[30] but it was not until the 1960s that clinical programs began to appear regularly as a part of the curriculum of law schools in this country.[31] This movement was in large part based on the scholarship of Professor Frank, which expressed a lack of confidence in the educational value of the exclusive use of Langdellian case method in law school instruction and proposed that law schools use the "apprentice" or "internship" systems employed by medical schools to prepare the upper-level student's transition into the practice of law.[32] Although substantial funding for legal clinics was put in place in 1959,[33] Frank's call for "legal dispensaries" did not take any substantial form until the 1960s and 1970s when a relatively small number of law schools established clinical course offerings, which met varied quantities of both success and resistance from the traditional faculty, administration, and state governments.[34] The utilization of legal clinics by

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schools.

Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 7-8 (2000) (footnotes omitted).

[30] *See* Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

[31] Vetri, *supra* note 5, at 60.

[32] Frank, *supra* note 30, at 916-17. "*Suppose, however, that there were in each law school a legal clinic or dispensary.* As before indicated, a considerable part of the teaching staff of a law school should consist of lawyers who already had varied experience in practice." *Id.* at 917 (emphasis in original) (footnote omitted).

[33] The Ford Foundation made available direct grants for law schools to create clinical programs with a goal of social change and access to justice for the disadvantaged.

> In 1959, the Foundation funded the National Legal Aid and Defender Association (NLADA) to establish a National Council on Law Clinics. It promoted the legal profession's responsibility to serve the indigent and gave law students direct experience in poverty-related legal issues. It also provided poor people with access to justice. In the United States and internationally, law clinics have since continued to bring quality law graduates to the practice of public interest law.

Ford Foundation Grantees and The Pursuit of Justice: Early History, http://www.fordfound.org/elibrary/documents/5020/008.cfm (last visited July 9, 2005).

[34] For example, clinical programs at the University of Mississippi School of

American law schools as a widely accepted, pedagogically sound teaching method picked up momentum in the 1980s, and, with the promulgation of the so-called "MacCrate Report,"[35] accelerated in the 1990s with most major institutions offering at least one experientially-based course in their curriculum.

It can be successfully posited by some legal educators that the traditional Socratic method is an effective tool for teaching basic legal principles and doctrinal pedagogy in first-year law courses. A new attitude in the legal instruction of second and third-year students is evolving that expands the pedagogic basis, curricular content, and the student's cognitive process of these upper-level clinical courses to "bridge the gap" between the doctrinal theory of law school and the practice of law in the "real world."[36] In fact, student demand of these experiential course offerings has, at least in part, driven this expansion of the law curricula.[37] The American Bar Association's curriculum standards now require that law schools furnish upper-level students opportunities to participate in "live-client" or other real-life practice experiences," although it is not necessary that all students be provided these opportunities.[38]

III. "LIVE-CLIENT" CLINICS VS. SIMULATION COURSES

Simulation courses (moot court, research and legal writing, trial advocacy, intra- and inter-law school competitions,

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Law were reestablished in 1997 when popular author and University of Mississippi Law graduate, John Grisham, made a grant to establish the Poverty Law Clinic (commonly known as the "Street Clinic"). Michael Landon, University of Mississippi Law School Sesquicentennial History (Oct. 18, 2005) (unpublished manuscript, on file with the Dean's Office at The University of Mississippi School of Law).

[35] TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM 239 (1992). The report was named after the chairperson of the task force, attorney Robert MacCrate. *Id.* at v.

[36] Stone, *supra* note 24, at 406-07, 431. *See* Fell, *supra* note 4, at 280.

[37] Fell, *supra* note 4, at 280.

[38] STANDARDS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 302(c)(2) (2003).

etc.) that require the law student to role-play the part of an attorney and then receive a critique of their performance from professors, other students, and sometimes outside practicing attorneys and judges, begins the process of the student finding the professional persona within and brings the student's doctrinal learning into fluid scenarios that begins the process of analysis and problem-solving "on the fly." These simulations are most effectively utilized in second-year courses that prepare the student for participation in third-year "live-client" clinical programs.[39] This type of simulation preparatory process is analogous to the moots of the Inns of Court, which sought to develop the student's ability to spontaneously analyze, problem-solve, and successfully argue points of the law to the upper-level students. These discussions were invaluable in the preparation for the eventual apprenticeship placement in the office of an experienced practitioner to complete the training of the prospective barrister.[40] Armed with the skills simulations give to the participants, the third-year law student of today is ready for the actual representation of the clinical client under the supervision of a staff of professors who "should consist of lawyers who already had varied experience in practice."[41] Actual client representation is necessary to involve students in what Professor Frank S. Bloch, then Director of Clinical Programs at Vanderbilt University School of Law, described as "andragogically sound active, experiential learning," which he argues cannot be accomplished through simulations.[42] His article also maintains that a "co-counsel relationship" must be established between the student and the teacher in live-client clinical settings.[43] The balance between this "co-counsel" and the traditional law professor/student relationship can be difficult to strike because of the very nature of the clinical setting. The clinical professor must be

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[39] Pertnoy, *supra* note 1, at 184.

[40] *See* Quigley, *supra* note 6, at 465.

[41] Frank, *supra* note 30, at 917.

[42] Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 347-48 (1982).

[43] *Id.* at 346.

willing to not only allow the student/lawyers the freedom to engage in independent thought and action in the case, but must also be willing to mentor and evaluate the performance in the clinical supervision portion of the course.[44] None of these inter-professional dynamics between client, professor, and student can be confronted in simulation exercises outside of the in-house live-client clinical setting.[45]

The supervisor should also make a conscious effort to develop the student/lawyers' sense of professionalism through the mentoring and evaluation process in the clinic.[46] This attempt to expose the student to these issues will "bridge the gap" in the transition of the law student to practicing attorney and will insure that the educational experience in the clinic includes learning to recognize and effectively deal with ethical, moral, and adversarial problems in a professional manner.[47]

IV. WHY A CRIMINAL APPEALS CLINIC?

The practice of criminal law provides the highest possible stakes in the legal profession: a citizen's life or liberty. Representation of the accused citizen in the criminal appeals clinical setting allows the student/lawyer to become absorbed in the sometimes deplorable life of the client, to see the practical application of the legal principles and precedents laid down by generations of appellate courts, to witness the reality of the trial court's proceedings through the trial transcript, to experience the consequences of the jury's verdict, and to recognize the possibility of protecting the client's rights and providing justice. Criminal appeals clinics provide a vehicle for the stu-

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[44] *See* Quigley, *supra* note 6, at 484-90.

[45] *See* Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 TENN. L. REV. 989, 992-93 (1997). *But see* Linda F. Smith, *Pedagogy: Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527, 534-35 (1999).

[46] *See* Cynthia Batt & Harriet N. Katz, *Confronting Students: Evaluation in the Process of Mentoring Student Professional Development*, 10 CLINICAL L. REV. 581, 593-99 (2004).

[47] *See* Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537, 542 (1990).

dent/lawyer to be a part of the justice system without the immediate, irreversible, and overwhelming responsibility that representation on the arrest/trial level requires of defense counsel.[48]

Criminal appeals clinics also serve a public-interest purpose; the cases are usually obtained through some type of court-appointed assignment and the clients are represented by the clinical team *pro bono*.[49] Indeed, the social justice mission of most clinical programs causes the plight of the poor to become a central point in the supervision of the student/lawyers.[50] The program's core ultimately seeks to provide the client with the best representation possible in any setting and succeeds or fails based on the student's efforts in the course of study (under the supervision and guidance of the clinical professor). Within this duality of purpose lies the tension between ethically sound and competent representation and the priority of providing the student with the most meaningful learning experience possible in a clinical setting.

Although institutions of higher learning appear on the surface to get "more bang for the buck" in approving and funding courses designed to serve a large percentage of the students enrolled in the department's course of study, this simplistic cost/benefit assessment may be misleading.[51] This assessment has been found to be true in law schools where class size has increased in the overall numbers of students admitted year after year. This translates into a classroom where large sections of students, as many as 100 or more, are instructed by a single professor, utilizing the Langdellian method, culmi-

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[48] For an overview of how criminal appeals clinics provide student/lawyers these valuable educational opportunities, see generally Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 GONZ. L. REV. 1 (1997-98).

[49] *See id.* at 53.

[50] Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 329-31 (2001). *See also* Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 874 n.63 (1996); Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469 (1992).

[51] Barry et al., *supra* note 29, at 21-26.

nating in a final examination that is intended to measure the student's learning experience in the course. This methodology has never been exclusively reserved to the first and second-year law students; many upper-level courses seek to teach very highly abstract subjects, such as the Rules of Evidence, trial and appellate advocacy, and lawyering skills in the same manner, through reading cases, resource materials, and textbooks, then engaging the students in a question and answer exchange in class designed to apply, analyze, and interpret the specific theory in the case scenario involved in the day's reading assignment. Use of hypotheticals in these Socratic exchanges are common, of course, but offer little, if any value to the students' development of the problem-solving skills that are essential to the practicing attorney. Clinical programs, on the other hand, appear on the surface to be very cost/benefit inefficient, serving only a small number of students, usually only eight to ten clinical students per supervising professor per semester.[52] However, the numbers game is misleading when the overall educational experience for upper-level law students is analyzed. A criminal appeals clinic not only provides advanced instruction in appellate practice and procedure, but also demonstrates the application of the Rules of Evidence to a myriad of factual situations, shows how the particular rule affects the case facts, and improves the student's analyzation skills in the application of the rule in the clinical setting. This type of instruction is much more effective in imparting advanced application of such abstract subjects, the skills of writing, and applied analysis.[53] Appeals clinics also enhance client interview skills, improve analytically-based problem solving, hone advanced focused research and concise writing abilities, and develop the student's perception of ethical responsibilities, the obligations as an officer of the court, along with an understanding of the concept of professionalism.[54] Since the classroom component of the course will

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[52] *See id.*

[53] *See* Linda F. Smith, *The Judicial Clinic: Theory and Method in a Live Laboratory of Law*, 1993 UTAH L. REV. 429, 472 (1993).

[54] *See* Angela McCaffery, *Transforming Minnesota Nice Law Students into*

extend to other practical skills training, such as fact gathering, client interaction simulations and role-playing, it may be helpful for the student to grasp the method to be applied during the client interview.[55] The "active listening" technique is very effective during the initial client contact,[56] and should be made a part of the classroom component to ensure that this part of the fact-gathering process not only gives the student/lawyer a narrative from the client, but also instills confidence in the client of the skills of the team.

Although it is not a course in writing styles, the very nature of the criminal appeals clinic requires the student/lawyer to effectively communicate and persuade through the written word.[57] The National Legal Aid and Defender Association's Appellate Defender Training formulated, advances, and teaches the "fact-intensive" method of brief writing, which employs the narrative style of writing in the statement of facts and carries this technique into the argument section of the brief by eliminating the "legalese" that clutters an otherwise sound issue argument.[58] These skills, along with the pedagogical goal of teaching effective appellate practice, will

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Vigorous, Yet Respectful Advocates: The Value of Simulations in Preparing Clinical Law Students for Ethical and Effective Client Representation, 7 T.M. COOLEY J. PRAC. & CLINICAL L. 91, 94-103 (2004). "It has been suggested that 'effective learning or excellence in legal ethics occurs only by acting in the role of a lawyer', and that '[perhaps] professional responsibility is not necessarily better taught in the clinical setting but it may be better learned.'" *Id.* at 108 (alteration in original) (internal quotation marks and footnotes omitted) (quoting Ian Johnstone & Mary P. Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 94-95 (1991)).

[55] Timothy H. Everett, *On the Value of Prison Visits with Incarcerated Clients Represented on Appeal by a Law School Criminal Defense Clinic*, 75 MISS. L.J. 845 (2006).

[56] Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 896 (1996).

[57] *See generally* Campbell, Angela J., *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653 (1993).

[58] For information of NLADA's annual appellate training program, see National Legal Aid & Defender Association Presents Appellate Defender Training: An Appellate Training Program for Defender Advocates, http://www.nlada.org/Training/Training/Train_Defender/Defender_Appellate_leftnav_Brochure (last visited Nov. 10, 2005).

likewise aid in the transition from student to lawyer, arming the law school graduate with tangible, practical, and fungible expertise that will make them more knowledgeable and marketable than their counterparts with no clinical experience.

Physical space for a criminal appeals clinic requires only a seminar-size classroom for lecture, discussion of clinical techniques, and case progress reports (sometimes referred to as "rounds") and computer work stations for the case teams to conduct research and writing. These work stations necessarily must be close together and the area should be private enough to allow the case team to meet with the supervising attorney/professor without others overhearing confidential matters or disturbing others. Most, if not all, law students today have access to such computer work stations either in the law library or a personal laptop computer, so a dedicated clinical space within the law school with the purchase of workstations in the start-up phase of the clinic would not be absolutely necessary, but optimally advisable, if possible. Since the clinical supervision hours are not sufficient to complete the weekly assignments, the law library computer room, laptops, and home computers are essential to the work conducted outside of the clinical supervision area.

Third-year students who have completed enough of their course work to commit a substantial quantity of time to working in a criminal appeals clinic should be dedicated to the case, but the clinical professor must be aware of the total amount of hours during the week the student is devoting to the case in the clinic. The use of timekeeping materials, whether electronically through computer programs such as TimeMatters® or simply by way of a paper time sheet, will allow the supervisor to track the time, whether too much or too little, the student/lawyer spends completing the weekly assignments. These time sheets should be turned in every two weeks and should a student be out of line with the recommended time (usually eight to ten hours per week including class and clinical supervision hours), the supervisor may wish to meet with the student before the mid-semester review to get the time spent back in balance.

The two-hour seminar lecture and the two-hour clinical supervision period in the Criminal Appeals Clinic at The University of Mississippi School of Law's curriculum awards four hours credit for successfully completing the course requirements. Less credit hours per semester would not reflect the amount of time and effort necessary to wholly and competently participate in the clinic. Workloads must be balanced in such a way as to allow the student to keep up with other obligations both inside and outside of the law school. The University of Mississippi's Criminal Appeals Clinic assigns each of the case teams one brief and one oral argument, and motions for rehearing and reply briefs are assigned to students who either want extra credit or excel in the process of the clinic.

V. FUNDING

Whenever a law school is considering adding programs to the existing curriculum, the first thought in a dean's mind is likely: "How are we going to pay for this?" Unless a grant is obtained that will at least partially fund the new clinical offerings, the money to start up the program will have to be taken from an ever-shrinking fund that is not sufficient to even maintain current courses of study and programs. The realities of the budget shortfalls in today's public and private institutions of higher learning have forced administrations to make hard choices in the expenditure of the money available for the operation of law schools and many deans are reluctant to divert established line items to start-up programs such as a clinic. When faced with these hard choices, the faculty and administration will often resist shifting resources from other parts of the law school budget that would be adversely affected in order to start a new clinical program.[59]

In addition to the difficulties faculties and administrations have with funding clinical programs, many law schools also have issues with the physical space available on-site to house these new courses of study.[60] These law school build-

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[59] Barry et al., *supra* note 29, at 26-27.

[60] *See* Philip C. Kissam, *Lurching Towards the Millennium: The Law School,*

ings were designed years, if not decades ago; therefore, with current student enrollment at an all-time high, available space is at a premium within the existing structure. Office space for faculty and staff is not readily available, and there is even less existing space for the required clinical supervision hours needed to complete the student's weekly assignments. Many law schools, faced with the prospect of an enormous capital improvement costs to the existing structure in addition to the new program's additional funding, have chosen to house the clinical programs and other space-intensive aspects of the institution in another existing building on campus.[61] This solution not only presents logistical problems for students, but also separates the clinical faculty even further from the traditional faculty, thereby potentially resulting in less contact, collegiality, and exchange of ideas and information between different branches of the law school.

Therefore, new funding sources necessarily are required to start up any new program within the law school, and university rules and regulations concerning faculty independently seeking grants, endowments, or dedicated gifts as seed money to get such programs off the ground may be violated if the administration is not first consulted before beginning a funding search. These new sources of funding do not have to take the traditional forms as set out herein; finding sufficient capital may require new and innovative fund-rasing techniques.

> In writing about funding mechanisms for more effective skills and values education, Professor David Barnhizer identified five sources of potential new funding: 1) preparing law students for the bar exam in special summer institutes taught by volunteer law faculty and practitioners (projecting a fund of $40 million per year based on $1,000 per student and 40,000 law graduates each year); 2) charging all law students a skills training fee; 3) changing the educational funding formulas for

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the Research University, and the Professional Reforms of Legal Education, 60 OHIO ST. L.J. 1965, 1994 (1999).

[61] *See* Elliott S. Milstein, *Celebrating a Centennial: A Proud Past, a Promising Future: Reflections in Brick and Mortar: Building a Vision, Realizing a Dream*, 45 AM. U. L. REV. 947, 947 n.3 (1996).

> state law schools to reflect the resources necessary to provide live-client clinical programs for all students; 4) increasing national and state bar dues by $100-200 per year and earmarking the funds for live-client clinics (producing between $70 and $140 million per year, assuming an average of 700,000 dues-paying bar members in the United States); and 5) designating new law school funds from fund-raising or tuition increases for live-client clinics."[62]

These sources take advantage of systems already in place and would not substantially affect the existing institutional funding that the law school and the university has in place and will not allow to be disturbed.

If the law school has substantial in-house clinical programs in place, the re-allocation of these existing resources will allow the establishment of a criminal appeals clinic. Without effectively taking one cent of funding from these existing courses of study, the sharing of physical space, support staff, and office supplies may permit the law school to begin an appeals program and later grow it when other resources become available. Much of the infrastructure necessary for an appeals clinic is present in law schools that do not have substantial clinical programs; libraries can serve as clinical supervision space and the clinic files may be digitized and maintained on internet web courses[63] offered by the two law school legal research giants present in every law school. Finding qualified clinical faculty within the law school with the contacts to collect the cases and the knowledge to conduct the class lectures, lead the supervisory conferences, and guide the case rounds through the final brief is challenging, but not impossible. Legal research and writing (LRW) professors with a criminal law background may be expediently utilized in creating a criminal appeals clinic; their educational expertise is simply reassigned to another part of the school, with other LRW faculty taking their place. Clinical professors suitable for a criminal appeals clinic may also be identified in-house from adjunct faculty whose

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[62] Barry et al., *supra* note 29, at 29.

[63] *See, e.g.*, LEXIS © BlackBoard Web Courses.

practice includes this specialized area of practice. More challenging, however, is converting these existing faculty into clinicians who are capable of practicing before the appellate courts, working closely with student/lawyers, and effectively administering a new program. Leveraging existing faculty into clinical positions may not be a workable solution in some institutions, because it may require the clinical section to add a professor to the faculty who will bring these disparate qualities to the position.

Finally, grants from the federal government and private sources that the university may access are always fertile sources of funding law school programs that fall under the umbrella of training and instructing students on issues dealing with criminal law. These grants include the Higher Education Act,[64] Bureau of Justice Assistance,[65] The Edward Byrne Memorial State and Local Law Enforcement Assistance Grant Program (Byrne Formula Grant Program),[66] Office of Justice Programs,[67] The Carthage Foundation,[68] The Impact Fund,[69] and countless other funding resources available from public and private sources. Grant writing is an art form and any attempt to obtain this type of funding requires detailed, fluid, and creative proposals; also multiple applications are usually required before the grant is awarded. Running a new program on a grant at a law school has its own sets of problems, including the reporting required to maintain the grant, the uncertainty of continued funding to sustain the program, and the university's own rules concerning allocation of funds through a

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[64] *See* 20 U.S.C. §§ 1071 *et seq.* (2000).

[65] *See* Bureau of Justice Assistance: Guide to Grants, http://bja.ncjrs.org/g2g/ (last visited Nov. 10, 2005).

[66] *See* Bureau of Justice Assistance, Edward Byrne Memorial State and Local Law Enforcement Assistance (Byrne Formula Grant Program), http://www.ojp.usdoj.gov/BJA/grant/byrne.html (last visited Nov. 10, 2005).

[67] *See* Department of Justice, Office of Justice Programs: Funding Opportunities at OJP, http://www.ojp.usdoj.gov/fundopps.htm (last visited Nov. 10, 2005).

[68] *See* The Carthage Foundation, Scaife Foundations: Application Guidelines, http://www.scaife.com/carthage.html (last visited Nov. 10, 2005).

[69] *See* The Impact Fund: Welcome to the Impact Fund, http://www.impactfund.org/ (last visited Oct. 10, 2005).

grant.[70]

VI. The Proposal: Three Clinical Models

This paper seeks to put forward to law schools a choice of three models of criminal appeals clinical programs to modify, follow, or adopt outright in their curriculum: the One-Semester Model, the Academic School Year Model, and the Rotating Case/Student Model. The choice of the model program will be determined by the individual law school's resources, the pedagogical goals of the school in creating such an appeals clinic, the willingness of the courts within the jurisdiction to cooperate and promote the program, and the potential number of students willing to participate in such a program. Each model has advantages and disadvantages that must be considered when adopting a program.

A. The One-Semester Model

The One-Semester Model seeks to complete the representation in the client's case with the student's participation in the course within a single academic semester. This model is rarely a totally "in-house" program, but rather in the nature of a field placement externship with student supervisory oversight provided in part by a clinical professor, adjunct faculty, and/or practicing attorneys within appellate defender institutions where the student/lawyer is assigned.[71] As a result, the students are not closely supervised in the "in-house" clinical sense during the brief-writing process, only doing piecemeal research and writing that will be incorporated into the brief as the product is finished by the supervising attorney in charge of the case. Although many law schools describe them as "appeals clinics" since a classroom component of appellate instruction is included in the course of study, this type of model is more

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[70] *See generally* Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971 (2003).

[71] *See* Christopher M. Johnson, *The New Hampshire Appellate Defender Program: An Apprenticeship Clinic*, 75 MISS. L.J. 825 (2006).

closely akin to an externship. This "hybrid in-house externship program" has clear advantages in providing clinical opportunities to students in an actual law office at a fraction of the cost of full-time in-house programs.[72] A law school with limited funds, little physical space, and few qualified clinical faculty may wish to utilize the existing institutions in the jurisdictional community (usually public defender appellate offices) to provide this type of educational experience.[73] Outsourcing clinical students to these existing institutions also has advantages for the community; the under-funded public interest offices welcome the additional help, often offering supervision that is valuable in other areas of practice other than criminal law and procedure. The real danger of this model is failing to provide enough oversight to the student/lawyer to make certain that their experience in the clinic pedagogically is sound and creditable.

B. The Full Academic Year Model

This model requires the student to devote their entire third year to criminal appeals (usually eight hours credit) in order to participate in the clinic. Much of this time is spent in simulation sessions, appellate practice instruction, extensive legal writing exercises, and interview role-playing. These mini-seminars prepare the student/lawyer to ultimately reach the actual live-client clinical experience of fact gathering, issue identification, and development through focused research and brief writing/editing in clinical supervision hours. If the law school offers other clinical opportunities, the student may have to forego taking part in different experiential disciplines because of time necessary to dedicate to this model, causing curricular constraints to the student. Full-time clinical faculty in sufficient numbers to conduct an ample number of student/lawyers that is both cost-effective and provides an essential *pro bono* service to the community at large is essential in this model. While the

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[72] Barry et al., *supra* note 29, at 28.
[73] *Id.*

full semester model provides plenty of time for the student/lawyer to hone their skills in the inestimable areas of criminal appellate practice, the time may be better spent in a single-semester model. Much of the time expended in this model is dedicated to preparation through simulations, thereby diminishing the emphasis on live-client representation in a pending appeal. Although preparation is key in any pursuit, starting the third-year student in the clinical setting, rather than continuing the simulation experience best reserved for second-year students, is preferable and a more profitable educational experience for the top-level law student.[74]

C. The Rotating Case / Student Model

Many of the positive and the negative points of the semester models are optimized in the Rotating Case/Student Model. In practice, clinics operate in the same way as does a law office, the cases continue their paths through the judicial system, even when the students move on to other classes or graduate. Using this model, the student/lawyers have the opportunity to work on and appear as an attorney of record not only for the appellate brief assigned to the case team, but also for another pending case, usually through oral argument, reply briefs, motions for rehearings, and/or petitions for writs of certiorari. In this way, the clinic will operate and the student/lawyers will be exposed to the same multitasking experience as practicing attorneys, without over-burdening the student with more cases than they can handle during a single semester. Case teams will work on a main appellate brief, prepare motions for rehearings and reply briefs, along with getting ready for an oral argument in a case from the previous semester. Clinical assignments scheduled over the course of the semester in this way ensure that the student/lawyer will be able to participate as counsel of record in multiple cases, but will not be overburdened with more work than they can handle.

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[74] Andrea M. Seilstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 449 (2002).

VII. Class and Clinic: The Course Structure

Before a student enrolled in the criminal appeals clinic may begin work on a case, training in the form of both a general clinical orientation and specialized appellate instruction must be accomplished.[75] In order to maximize the time available in the semester, this orientation training should be completed before the semester classes begin, so that time spent in the clinic may be utilized in fact gathering, identifying issues, researching, writing and editing, not in determining *how* to complete these elements of the process.[76] Professionalism and ethical considerations should also be presented in the orientation sessions so that the student/lawyers may be able to at least recognize that a problem exists when confronted with such an issue.[77] Once a student successfully completes the orientation training, the clinic then should petition the courts to admit the participant in the clinic to the limited practice of law and to specially appoint the student lawyer as counsel of record in the case.[78] The clinical supervising professor should consider whether to make an appellate advocacy course a prerequisite for participation in the clinic, along with evidence, litigation, criminal procedure, and other preparation courses that would be helpful for the student/lawyer to make the most of their

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[75] *See* Laflin, *supra* note 48, at 12.

[76] *See* Laflin, *supra* note 48, at 12 & n.57. The Criminal Appeals Clinic at The University of Mississippi School of Law also employs a clinical handbook to assist students in the pre-semester orientation. The University of Mississippi School of Law: Criminal Appeals Clinic Handbook, http://www.olemiss.edu/depts/law_school/ruleoflaw/CACHandbookrev.pdf (last visited Nov. 11, 2005).

[77] *See* J. Thomas Sullivan, *The Clinician as Ethical Role Model in the Criminal Appellate Litigation Clinic*, 75 Miss. L.J. 741 (2006).

[78] "In 1969, the American Bar Association (ABA) promulgated a Model Student Practice Rule with the express purpose of assisting the bench and bar in 'providing competent legal services for . . . clients unable to pay for such services and to encourage law schools to provide clinical instruction.'" Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 Clinical L. Rev. 49, 51 n.3 (2004) (quoting *Proposed Model Rule Relative to Legal Assistance by Law Students*, 94 Rep. of the A.B.A. 290, 290 (1969)). "Since that time, every state, the District of Columbia, and most federal courts have adopted student practice rules, usually based on the Model Student Practice Rule." *Id.*

experience in the clinic.

It has been stated hereinabove that eight students in each section of the clinic is an ideal number by both academic scholarship and advocacy institutes such as the National Criminal Defense College, the National Legal Aid and Defender Association, and the Western Trial Advocacy Institute.[79] It would be possible to employ a group of twelve students (working in pairs) with six clinical supervision sessions during the week, but these larger clinical classes necessarily require more staff to adequately supervise the students on an individual basis.[80] Some teaching models allow the students to work more independently in larger groups, but ongoing team brainstorming, researching, writing, editing, and critiqueing of the work product is sacrificed in this model and the work necessary to "clean-up" the first and the last draft of the brief is considerable.

Another feature of the Criminal Appeals Clinic at The University of Mississippi School of Law, although not unique, is assigning each pending appeal two student/lawyers who work as a team on the brief as the main assignment in the clinical semester.[81] Two student/lawyers working together on a single case allows for collaboration and brainstorming together when working independently and in the dynamic of three when being supervised by the clinical professor.[82] This collaborative process not only promotes Professor Bloch's "co-counsel relationship between the student and the teacher,"[83] but also encourages the student/lawyers to work within a hierarchy of their

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[79] "[A]n average ratio of eight students to one full time faculty member (8:1)" in live client, in-house clinics was reported as typical by the MacCrate Report. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, *supra* note 35, at 250; *see also* Sullivan, *supra* note 7, at 1306.

[80] *Id.*

[81] *See* Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 307 (2005).

[82] Catherine Gage O'Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 CLINICAL L. REV. 485, 514 (1998).

[83] Bloch, *supra* note 42, at 348.

peers.[84] This student collaborative process is carried through in oral arguments, motions for rehearings, and reply briefs where case teams are reassigned to allow the students to work with other members of the clinic on other projects, thereby expanding the opportunity for learning through collaboration.

The problem of attempting to increase class size and the number of briefs produced in a single semester without sacrificing individual attention to the students may be solved by to employing the assistance of legal writing faculty as additional clinical supervisors, seek out adjuncts from local practitioners with specialized skill in appellate advocacy, or utilize fellowships to be awarded to recent graduates who participated and excelled in previous semesters of the clinic.[85] In this way, this 8:1 ratio can be maintained and greater numbers of both students and clients may be served by the clinic.

The classroom component of the criminal appeals clinic should be front-loaded with lecture and discussion of the practical aspects of procedural and substantive law that governs the jurisdiction where the cases will be accepted by the clinic. Lecture sessions should incorporate seminar type discussions of these topics, as some students will be more familiar than others in the local appellate practice and procedure of the jurisdiction, and they will be able to lead these seminars in such a way that the others may gain insight into the topic at hand. The goal should be to impart advanced research and writing techniques to the students so that they may carry those methods into the clinical assignments.[86]

In addition to the classroom component of the course, clinical supervision hours with each case team will provide individual attention in identifying the students' strengths and weaknesses and will provide feedback in both areas.[87] The clinical professor will find this time-intensive supervision to be taxing, but this superintendence will lessen as the case team identifies

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[84] O'Grady, *supra* note 82, at 520-28.
[85] *See* Barry et al., *supra* note 29, at 27.
[86] Fell, *supra* note 4, at 292.
[87] Quigley, *supra* note 6, at 489.

the issues in the case, finds case law through research, and begins the writing and editing process. Although there exists considerable variance among clinicians about how much "interference" with the work of the student/lawyers should occur during the supervision, the clinical professor must strike the balance between independence and guidance of the students and the obligation to the client that works for their program.[88]

VIII. Choosing the Case for Use in the Clinic

One of the most important aspects of starting up a criminal appeals clinic is the ability of the clinical supervising professor to obtain cases awaiting review by the appellate courts of the jurisdiction for use in the clinic. Pending criminal appellate cases may be accessed in many different ways, but relying on the courts to assign them to the Clinic implicitly means that the supervisor may not pick and choose cases for the most potential educational value. However, obtaining the cases from public defenders who originally handled the trial, from appellate defender institutions charged with taking over the case after conviction or from trial courts will allow case selection, rather than case assignment. A set of criteria for choosing the cases[89] must be in place to guide the supervising attorney in choosing cases that will not only provide the students with the best educational experience possible, but will also serve those clients who would otherwise not receive representation from a specialized team of appellate lawyers who have the time and resources to devote to the client's case.[90] Indigent appellants who are represented by such a team of lawyers receive, in most cases through the Criminal Appeals Clinic at The University of Mississippi School of Law, better representation than would otherwise be provided through the public defender system pres-

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[88] Laflin, *supra* note 48, at 15-18.

[89] Kimberly E. O'Leary, *Clinical Law Offices and Local Social Justice Strategies: Case Selection and Quality Assessment as an Integral Part of the Social Justice Agenda of Clinics*, 11 Clinical L. Rev. 335, 336-40 (2005); Adam Babich, *The Apolitical Law School Clinics*, 11 Clinical L. Rev. 447, 460-67 (2005); *see also* Seilstad, *supra* note 74, at 498-500.

[90] Laflin, *supra* note 48, at 9-11.

ently in existence in the state.[91]

Choosing the cases to be researched and briefed by the student/lawyers in a criminal appeals clinic is much like picking a jury to serve during the trial of a legal action: it is not so much about selecting those whom the lawyer *wants* to decide the case as it is a process of getting *rid* of the jurors with which one cannot abide. Appellate cases devoid of potentially viable issues from the record for research and briefing by the students are simply not suitable for use in the clinical setting. Additional negative factors implicated in case selection for criminal appeals clinics include claims of error that were procedurally defaulted by defense counsel, factual scenarios that do not lend themselves to distinguishment from contrary controlling case law, convictions that stem from exceptionally outrageous, loathsome, or shocking crimes (i.e., the rape and murder of a two-year old child). Also, logistical problems such as clients who are incarcerated more than a day's drive from the law school make personal interviews with the client virtually impossible.[92] Potential clients who are overbearing, uncooperative, or mistrustful of student/lawyers working on their case can also preclude representation by the clinic.

All cases and/or clients may not be ideal for the clinical setting, but the number of cases required to serve students interested in this clinical experience attending law schools situated in rural areas necessitate a more optional evaluation of the available pending appeals. The relatively small temporal window to solicit, identify, and assess cases for use during the academic semester only aggravates the problem of the deficiency of cases that meet the minimum standards for use in the clinic. These limitations in both the number and the quality of

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[91] Mississippi has no formal, systematic organization of indigent defense; however, the Legislature created and funded the Office of Indigent Appeals during the 2005 session. S.B. 2960, 2005 Leg., Reg. Sess. (Miss. 2005). Although this bill was signed into law by the Governor on March 21, 2005, no director of the office has been named, nor has the office been put into place as of July 27, 2005.

[92] *See* the symposium article herein entitled, "On the Value of Prison Visits with Incarcerated Clients Represented on Appeal by a Law School Criminal Defense Clinic."

cases brings about a difficult process of making a choice among the appeals to utilize in the clinic that culminate in three conceptual dynamics: (1) how a clinic *can* select its cases, (2) how a clinic *should* select its cases, and (3) how a clinic *does* select its cases. Recognition of the way in which these dynamics come together will produce dependable answers to the question of which cases/clients to accept in the clinic each semester.

Therefore, as a result of the fluid nature of the choices to be made, the clinical professor must engage in "de-selection"[93] of the cases available for use in a criminal appeals clinic to attain the relative balance of educational value for the students with the obligation to provide public service to the community of indigent clients awaiting appellate review of their convictions. Although the pool of cases from which to choose is relatively limited in most rural jurisdictions,[94] law schools located in urban areas near multiple state and federal appellate court systems have the luxury of obtaining, evaluating, and rejecting more cases than it accepts for use in the clinic.[95] This "de-selection" inquiry will ensure that the criteria established for discerning the ideal appellate case (identified in the scholarship referred to hereinabove) is effectuated, utilizing the practical, ethical, and pedagogical considerations involved in quantifying and eliminating the cases/clients that are unsatisfactory under the stated objectives of the clinic. This method of case "culling" will not guarantee that every case team will gain a reversal in their client's appeal, but it will ensure that the student/lawyers will have the challenge of dealing with the unique facts, legal principles, and resulting analysis contained within the cause of action before the court. This outcome satisfies the mission of the criminal appeals clinic.

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[93] This term has been advanced by Jennifer P. Lyman, Professor of Law and Director of the Federal Appeals Clinic, George Washington University National Law Center.

[94] *See* Diane Courselle, *When Clinics are "Necessities, Not Luxuries": Special Challenges of Running a Criminal Appeals Clinic in a Rural State*, 75 MISS. L.J. 721 (2006).

[95] *See* Sullivan, *supra* note 7, at 1279-80.

IX. Conclusion

By adopting a criminal appeals clinic, a law school exposes third-year students to the world of criminal law and procedure and, in addition, gets a clinical program with all that it entails at a relatively low price. Since most law schools have dedicated clinical space already in place or have available library computer stations, the major issue will be finding a qualified clinical professor to direct, supervise, and sustain the program. This addition to the faculty can be a valuable asset in attracting and successfully recruiting students who want to have a wide range of choices in the upper-class curriculum, including advanced instruction in the area of criminal practice. In addition, the unique opportunities for *pro bono* service to indigent clients awaiting review by the appeals courts are of positive significance in the overall mission of the law school.

The following symposium articles are designed to give the new criminal appeal clinic professor the benefit of the experiences of the leading clinicians in the country in this area of legal education in an effort to guide not only the start up of such a clinic, but also in the endeavor to maintain the criminal appeals clinic without reinventing the wheel in the subjects presented by the authors. The combined experience of these professors will guide the new clinician in successfully establishing, operating, and sustaining a criminal appeals clinic at your law school.

THE CRIMINAL/JUVENILE CLINIC AS A PUBLIC INTEREST LAW OFFICE: DEFENSE CLINICS; THE BEST WAY TO TEACH JUSTICE

Thomas F. Geraghty[*]

I. INTRODUCTION

There is a debate among clinicians about how clinical programs should be structured, what kind of legal work they should do, and the extent to which clinical programs should stress the involvement of students and faculty in social justice issues. Some believe that in recent years, clinical education may not have been true to its roots as it has moved away from emphasizing the provision of legal services to the poor.[1] Others rightly assert that because clinical programs are part of the law school's teaching mission, service should be balanced with appropriate opportunities for reflection on lawyering experiences.[2]

In this article, I argue that both objectives can be realized through the creation and maintenance of a clinical program that is focused on making justice systems better and that clinical programs that focus on criminal justice have perhaps the best potential for teaching justice. I attempt to do this by providing examples of cases handled by our clinical program that have taught our students, that have informed judicial decision-making, and that have supported the cause for reform

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[1] *See generally* Stephen Wizner, *Walking the Clinical Tightrope: Between Teaching and Doing*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 259 (2004).

[2] *See generally* Jane Aiken, *Walking the Clinical Tightrope: Embracing the Role of Teacher*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 267 (2004).

in the public interest. By no means do I suggest that other forms of practice are not essential components of any well-balanced clinical program. And I admit that having been engrossed in criminal and juvenile defense practice for thirty-five years, my views may be a bit skewed. But those thirty-five years have taught me that, for students, the experience of seeing first-hand the relentless tragedy that is our criminal justice system from beginning to end–pre-trial detention, trials, and prison is an invaluable means of both gaining experience and forming a life-long commitment to social justice issues.

II. Six Stories from a Criminal Justice Clinic

Story 1

We first represented Johnnie Brown in 1979 when he was charged with burglary. I negotiated a plea for Mr. Brown that resulted in him enlisting in the Navy. He remained in the Navy for years and then was dishonorably discharged, the signs of mental illness beginning to show. Mr. Brown came back to Chicago where he soon was charged with two armed robberies and a sexual assault. My students and I represented him again. We won one trial and lost another. Mr. Brown was sentenced to eight years in the penitentiary.

While in the penitentiary, from 1985-1992, Mr. Brown was diagnosed with chronic schizophrenia. After his release from the penitentiary, he promptly picked up another charge–an armed robbery. The weapon in question was a knife. The proceeds of the robbery: twenty-five cents and an adult book store token. We declined to represent him again thinking that he might do better with another lawyer. He was again convicted. This time he was sentenced to thirty years in the penitentiary based in large part on his criminal record. Mr. Brown's family contacted us after his conviction and sentence. We found that no evidence had been presented at trial or at sentencing concerning Mr. Brown's mental health problems. We initiated state post-conviction proceedings and lost in the Illinois courts. We lost in the federal district court, but

won in the Seventh Circuit. The Seventh Circuit held that Mr. Brown had received ineffective assistance at trial because his mental health status was not presented at trial or at sentencing. A succession of students was involved every step of the way.

In its opinion, the Seventh Circuit stated:

> This case exposes a tragic breakdown in the Cook County, Illinois criminal justice system. A mentally ill criminal defendant of recent vintage was arrested, put on trial, convicted of armed robbery, and sentenced to a term of thirty years without anyone taking proper notice of the fact that this same defendant had been diagnosed on more than one occasion, confined and treated (from 1986-88), and medicated intermittently for chronic schizophrenia for an extended period of years. His *court-appointed attorneys* provided a half hearted defense, neglecting to thoroughly investigate his medical condition and failing to procure medical records establishing that he suffered from a myriad of psychiatric problems. Thereafter, the attorneys proffered self-serving affidavits once their lackadaisical lawyering was revealed and challenged. Their less-than-lawyer-like attention to duty caused problems for the *court-appointed psychologist and psychiatrist.* These doctors, relying on inadequate data, filed reports with the court that could best be classified as incomplete, as they ignored essential documentation of his medical history . . . , a basic element and requirement of any competency evaluation, and furthermore overlooked important information easily ascertainable from the defendant's family members. The *state probation officer*, in preparing the pre-sentence investigative report, neglected to interview the defendant's family members, to make a thorough inquiry about Brown's prior confinement, (*i.e.,* his adjustment to his institution), to investigate the circumstances surrounding his general discharge from the Navy, or his mental health history. Thus, the *sentencing judge* was less than well-informed of critical information, including the defendant's long and well-documented history of mental illness, as well as his prolonged period of treatment and confinement in a psychiatric unit during his prior impris-

onment.[3]

After the case was remanded to the state court and dismissed upon the motion of the State, the newly assigned judge to the case said to Mr. Brown:

> On behalf of the Chief Judge of the Circuit Court of Cook County, the Honorable Timothy Evans, and on behalf of the Presiding Judge of the Criminal Division, I want to extend to you my sincere apology for what has happened to you in the last 12 years on this case.
>
> You did, in fact, as the Seventh Circuit Court of Appeals indicated, receive the very worst that the criminal justice system has to offer. I am shocked and ashamed at the conduct of your lawyers in this case.
>
> The State's Attorney's Office also is deserving of criticism in this case too, because it seems to me that it was impossible for the State's Attorney not to know that the affidavit presented to the Court was perjurious [sic] as the Seventh Circuit again found.
>
> Your lawyers, when given an opportunity to straighten out their incompetent representation of you, chose to lie, and chose to lie to the Court, sending you on a 12-year saga of up and down the court system.
>
> I'm also, Mr. Brown, aware of my obligations under In Re Himel, and I intend to fulfill my obligation in that regard. I can only say to you that I am deeply sorry, I am deeply sorry.
>
> I agree with the Seventh Circuit in its entirety. I think your lawyer who picked up your case the day of your trial and then proceeded to try you for a Class X felony, having met you an hour or so earlier, was in exhibition of gross incompetence.
>
> I extend to you, as I indicated, the apologies of our court system. It offers better when it functions properly. Your lawyers thought more of hiding their incompetency than your freedom.
>
> Good luck to you, Mr. Brown.[4]

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[3] *Brown v. Sternes*, 304 F.3d 677, 680 (7th Cir. 2002).

[4] Report of Proceedings, *People v. Johnnie Brown* (No. 91 CR 08246-01), Nov. 26, 2003 at 2-3.

Story 2

Dino Titone was charged in 1983 with two counts of murder. The two victims were found bound in the trunk of a car shot to death. According to Mr. Titone's family, the lawyer they hired to represent Dino demanded money from them (in addition to a fee) to give to the judge in order to guarantee that the death penalty would not be imposed. After the money was allegedly given to the judge, the Greylord Scandal broke in Cook County. The judge got nervous, returned the money, convicted Mr. Titone, and sentenced him to death. My then colleague at Northwestern, Ian Ayres, had been appointed by the Illinois Supreme Court to represent Mr. Titone. Together, we appeared in court to file a petition alleging that the judge, before whom we were filing the petition, had extorted money from our client. The case was assigned to another judge, and of course, our petition was dismissed in the trial court. Numerous appeals later, and after the judge was sentenced in federal district court for his corrupt judicial behavior, a very respected trial judge granted Mr. Titone post-conviction relief. The judge stated:

> I cannot truly articulate the pain that I have borne in listening to the horrible things that went on in this case in what is supposed to be a courtroom of law and justice. And no amount of procrastination on my part, no amount of reluctance on my part can wipe out the fact that under the circumstances that have been presented here what went on in that courtroom as to Dino Titone was not justice. And Dino Titone did not receive the kind of a fair [sic], impartial trial before a fair, unbiased, impartial judge that his constitutional right as a citizen required.
>
> And I am going to reconsider my prior denial of Titone's motion that this entire process be wiped out, this entire corrupt process be wiped off the books, and that he be given an opportunity to have his case heard in a courtroom not tainted and besmirched with a corrupt judge and a corrupt defense attorney, but that he be given the kind of a trial that our Constitution promises to every citizen charged with a violation of criminal laws of this state or of the United States. And

I'll write an opinion to that effect.[5]

Story 3

In 2000, Sarah Sanchez[6] was charged with murdering her new-born infant. A penniless immigrant from Guatemala whose husband had left her, she gave birth alone in her apartment and nearly bled to death before she was found by a family member. Her infant daughter died before medical help arrived. The State charged that Sarah suffocated her child, claiming that Sarah told the police that she put a blanket over her new-born child's mouth to prevent her family members from hearing the child cry. Sarah had not told her family that she was pregnant. Our expert witnesses countered the State's assertion that Sarah was guilty of murder. A physician familiar with the effects of blood loss on cognitive ability testified that Sarah could not have made an accurate statement about the death of her child. A nationally-known neonatologist testified that the baby died from respiratory failure as the result of a pre-existing infection, not from suffocation. The judge found our client not guilty. In finding Sarah not guilty, the judge stated:

> As both sides in their final arguments did state to me that this is a tragedy, and there is nothing short of being a tragedy when a child dies shortly after child birth.[7]
>
> However, I don't find even from the statement itself that this was preplanned event. My impression of Ms. Sanchez is that if I don't do anything, nothing will happen, and I don't have to worry about it is my impression of what happened here. She was hoping it would all go away . . . . But I don't see that there was a planned intent to murdering of the baby as argued in part of the State's argument.
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> That I then looked at the testimony of the experts. As to Dr. Donoghue, he stated that he relied on the statement itself

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[5] Report of Proceedings, *People v. Dino Titone* (No. 83 C 127), July 25, 1997 at 12-13.

[6] Ms. Sanchez's real name has been changed.

[7] Report of Proceedings, *People v. Sarah Sanchez* (No. 98 CR 31324), June 18, 2003 at 3.

in saying that was something outside of the evidence that he had. And based on that, that he found that this was a death by asphyxiation and that the cause of death was homicide.

That Dr. Harris, the neonatologist, testified that he stated this was a respiratory death due to pulmonary disease. That he doesn't believe that it was an asphyxiation type situation.

That Dr. Areford has stated that he believed it was asphyxiation.

And I had to weigh the testimony of the medical examiners. And Dr. Teas stated that there was something that could not be determined. She was also the medical examiner expert through [sic] the defense stated from the evidence that she saw that there was no way that you could determine what the cause of death was.[8]

So that I did look at the acts, looking at the statement itself, I went back to look at the statement itself. And looking at the statement, I don't believe even taking [sic] in the best light favorable to the State, and I did take into consideration Dr. Thomma's testimony that this was woman when she testified would be someone who would be very suggestible. That she would try to avoid conflict. And [t]hat she may had [sic] been based on her loss of blood confused as to what happened. He was stating based on his opinion she may have memory problems as to what occurred during this period of time.

That I could not find at this point that this was a murder – that murder would be the—that this was intentional act or that she even knew what acts were talked about in the statement. It could have been something that was causing great bodily harm.[9]

I remember being—hearing stories of Judge Went and Judge Went in several cases would say that six of them believed that this was a guilty. Six of them believed it was a not guilty. It was his finding that he was hung on this case.

I reworked out the testimony on both sides, and I found that I now understood what Judge Went was talking about . . . .

When I look at the end of Dr. Areford's, his minimal level

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[8] *Id.* at 10-11.
[9] *Id.* at 12.

> of confidence, looking at Dr. Harris, the neonatologist, and I cannot beyond a reasonable doubt say that the death couldn't had [sic] resulted from something that was unconnected to the defendant and what was [sic].
>
> So at this point there will be a finding of not guilty as to the charges.[10]

Story 4

An eleven year old boy was taken to the police department and questioned about the murder of his eighty year-old neighbor. The murder occurred a year before the interrogation. The child confessed to the murder after a relatively brief interrogation. No physical evidence tied the child to the murder, no witnesses saw the child with the victim. The child claimed that he confessed because he was told he could go home if he told the police he was guilty.

At trial, the child was represented by privately retained counsel. No motion to suppress the child's statement was made in the juvenile court trial. The child was convicted of murder. Our clinic took the case on appeal. Appeals failed in the Illinois Appellate and Illinois Supreme Courts.[11] A federal district court judge granted habeas relief, and the Seventh Circuit affirmed, finding that our client's confession was involuntary:

> Although we may not apply a *per se* rule, youth remains a critical factor for our consideration, and the younger the child the more carefully we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or simple immaturity that would not affect an adult has tainted the juvenile's confession. *Hardaway v. Young,* 302 F.3d 757, 765 (7th Cir. 2002), *cert. denied,* 538 U.S. 979, 123 S.Ct. 1802, 155 L.Ed.2d 668 (2003).
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> Here, the circumstances weigh in favor of a determination that Morgan's inculpatory statements were involuntary. When Morgan sat, alone, in the police interrogation room, he

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[10] *Id.* at 13-15.

[11] *A.M. v. Butler,* 360 F.3d 787 (7th Cir. 2004).

was not even old enough to be caddy on a golf course under Illinois law. [FN9] And to repeat, he had no prior experience with the criminal justice system. Detective Cassidy continually challenged Morgan's statement and accused him of lying, a technique which could easily lead a young boy to "confess" to anything. No friendly adult, moreover, *801 was present during the questioning. [FN10] When a youth officer was brought in, there is no evidence that he did anything to protect Morgan's rights. As we made clear in *Hardaway,* "a state-provided youth officer who functions as nothing more than an observer will not be considered a friendly adult presence for purposes of the totality of the circumstances." *Hardaway,* 302 F.3d at 765. Finally, after the first inculpatory statement was uttered, Morgan was given a standard version of his rights. [FN11] *Cf. Michael C.,* 442 U.S. at 726-27, 99 S.Ct. 2560 (a 16-year-old juvenile voluntarily and knowingly waived his Fifth Amendment rights under an interrogation where he had considerable experience with the police and had his *Miranda* rights explained to him); *United States v. Male Juvenile,* 121 F.3d 34, 40 (2nd Cir.1997) (confession voluntary after juvenile had rights explained to him by FBI agent). A comparison with *Hardaway* is relevant. There, "with the gravest misgivings," we held that a state court's decision that a confession by a 14-year-old with extensive prior history with the criminal justice system, including 19 arrests, was not involuntary was not unreasonable. *Hardaway,* 302 F.3d at 759. In contrast, here, Morgan was 3 years younger and inexperienced with the police. Considering these facts, we cannot say the state court's decision was reasonable. The statements should have been suppressed. At the very least, the admissibility of his statements—on *Miranda* and voluntariness grounds—should have been vigorously challenged in pretrial motions by his counsel. Not to have done so compels the conclusion that counsel was ineffective.

FN9. See § 20 ILCS 205/2, which sets 13 as the minimum age for caddies in Illinois. Illinois law also severely limits children under the age of 16 from doing almost any kind of work.

FN10. As the Supreme Court has said, a juvenile in police custody needs "the aid of more mature judgment as to the

steps he should take in [his] predicament . . . . [A]n adult relative . . . could have given [the juvenile] the protection which his own immaturity could not." *Gallegos v. Colorado, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962).* Of course, the Supreme Court has never required *per se* the presence of an adult, *see Michael C., 442 U.S. at 718, 99 S.Ct. 2560,* but it is, however, a significant factor in considering the "totality of the circumstances." In fact, "in marginal cases—when it appears the officer or agent has attempted to take advantage of the suspect's youth or mental shortcomings—lack of parental or legal advice could tip the balance against admission." *United States v. Wilderness, 160 F.3d 1173, 1176 (7th Cir.1998).*

FN11. There is no reason to believe that this 11-year-old could understand the inherently abstract concepts of the *Miranda* rights and what it means to waive them. *See,* Grisso, "Juvenile's Capacities to Waive *Miranda* Rights: An Empirical Analysis," 68 Calif. L.Rev. 1134, 1141-42, 1153-54, 1160 (1980) (finding that 96 percent of 14-year-olds lack an adequate understanding of the consequences of waiving their rights).

Moreover, psychological studies argue that juveniles are highly susceptible to adults' suggestions. *See, e.g.,* Maggie Bruck & Stephen J. Ceci, "The Suggestibility of Children's Memory," 50 Ann. Rev. Psychol. 419 (1999). Journalists have also recently reported on children's susceptibility to adults' suggestions during interrogations. *See, e.g.,* Alex Kotlowitz, "The Unprotected," *The New Yorker,* Feb. 8, 1999, at 46, 48; Margaret Talbot, "The Maximum Security Adolescent," *N.Y. Times,* Sept. 10, 2000, 6 (magazine), at 41, 88.[12]

On remand to the Juvenile Court of Cook County, the State declined to prosecute and the case was dismissed.

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[12] *Id.* at 800-01 (as cited on Westlaw).

Story 5

Our Clinic was appointed in 1989 to represent Leroy Orange, a condemned prisoner. Our first interview with Mr. Orange took place in the Menard Correctional Center in Southern Illinois. During this interview, Mr. Orange told us what he had told the trial court: his confession was the product of torture–electro-shock–administered by police officers at Chicago's Area 2 headquarters. It was also apparent from reading the transcript of Mr. Orange's trial that his privately retained lawyer had done no investigation into mitigation. The hearing that resulted in the death sentence being imposed took up less than a quarter of a page of transcript. In 1990, when we filed a post-conviction petition alleging that Mr. Orange had been tortured, neither the trial court judge nor the Illinois Supreme Court gave any credence to Mr. Orange's, in our view, well documented claim that he had been electro-shocked.

From 1990 to the present, working with a team of lawyers who documented at least sixty similar claims of torture at the hands of the same officers involved in Mr. Orange's case, the following has occurred. The Illinois Supreme Court has ordered hearings in at least three "Area 2" cases,[13] Governor George Ryan pardoned Mr. Orange, Ronald Kitchen, and Stanley Howard based on his conclusion that the statements made by these men were coerced by torture,[14] a special prosecutor has been appointed to assess the claims of torture to determine whether criminal charges should be brought against the police officers involved.[15] The claims brought by these men, along

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[13] People v. King, 735 N.E.2d 569 (Ill. 2000); People v. Patterson, 735 N.E.2d (Ill. 2000); People v. Kitchen, 727 N.E.2d 189 (Ill. 1999), *modified*, No. 83654, 2000 Ill. LEXIS 336 (Ill. Apr. 3, 2000).

[14] *See* Steve Mills & Christi Parsons, *"The System Has Failed": Ryan Condemns Injustice: Pardons 6: Paves the Way for Sweeping Clemency*, CHI. TRIB., Jan. 11, 2003, at 19; Abdon M. Pallasch, *Gov. Ryan Empties Death Row of All 167: Blanket Clemency Expected to Have Sweeping Impact*, CHI. SUN-TIMES, Jan. 12, 2003, at 2; Chris Wetterich, *Ryan to Pardon 4 Tied to Cop Torture*, CHI. SUN-TIMES, Jan. 10, 2003, at 1.

[15] *See* Carlos Sadovi, *Ex-judge to Probe Torture Claims Against Fired Cop*, CHI. SUN-TIMES, Apr. 24, 2002, at 3.

with investigations of other cases led by our Center on Wrongful Convictions, result in Governor Ryan's decision to commute all sentences of prisoners on Illinois' Death Row. This announcement was made at the Northwestern University School of Law in January of 2003. Since then, Northwestern's Center on Wrongful Convictions has obtained exonerations for other prisoners[16] and has been influential in securing the passage of legislation designed to minimize the possibility that wrongful convictions will occur in the future.[17]

Story 6

Four years ago, a fifty-three-year-old Korean woman was working behind the counter of a dry cleaning store on West Roosevelt Road. She and her husband hoped to buy the business. Two men walked in. One demanded money. The other acted as a look-out. The woman turned to get money out of the cash register. One of the men shot her in the back, paralyzing her from the waist down. Our client, an African American male, was arrested a few hours later, allegedly because he was wanted for a previous robbery of the same store. He was given a gunshot residue test (Atomic Absorption, a test no longer used by our crime lab because it has been shown not to be a reliable indicator of the presence of gunshot residue) on his hands. His clothing was tested for gunshot residue using Scanning Electron Microscopy technology. The Atomic Absorption test revealed low levels of barium, antimony, and lead. The state crime lab technician found the results consistent with handling a gun, firing a gun, or being in close proximity to a fired weapon. The Scanning Electron Microscopy test revealed

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[16] *See* Jeff Coen, *Convict Wins Retrial on 1993 Attempted Murder: Judge Set Aside 90-year Sentence in a Related Case*, CHI. TRIB., Feb. 12, 2003, at 4; Jeff Coen, *Inmate Free After 10 Years in Prison: Retrial Held in '93 Case After DNA Exonerated Him*, CHI. TRIB., June 7, 2003, at 18.

[17] *See* George H. Ryan, Report of the Governor's Commission on Capital Punishment (Apr. 15, 2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html; *see also* Edwin Colfax, Status of Action on Recommendations of the Illinois Governor's Commission on Capital Punishment (June 23, 2003), http://www.law.northwestern.edu/depts/clinic/wrongful/documents/gccpstatus.htm.

two gunshot residue particles on the cuff of our client's jacket. Under state crime lab standards, three such particles were required for a finding that gunshot residue was present. The State presented evidence that our client resisted when the police attempted to swab his hands for gunshot residue.

Thirty-six hours after the victim emerged from surgery, investigating officers went to the hospital with photographs of suspects. The investigator said that he showed the victim five photographs. The victim, in various out-of-court and in-court statements, was inconsistent about how many photographs the police showed her. On one occasion, she said that she was shown two to three photographs. In another statement she said that she was shown one photograph. At a pre-trial hearing, she testified that she could not remember how many photos she was shown. But she did remember that she picked out the photograph of our client as the man who shot her. Our client denied the charges. He did not testify at trial. We represented him at trial. A jury found him guilty. We believe that he is innocent, a victim of a mistaken identification and unreliable scientific evidence.

Before trial, we sought leave of the court to call as a witness at trial a nationally known psychologist with expertise regarding the reliability of eye-witness identifications. We sought to bar evidence of the unreliable Atomic Absorption gunshot residue testing evidence. We also sought to call a psychiatrist to testify about the effects of trauma, extensive surgery, and pain medication on the ability of the victim to make a reliable identification. All of these motions were denied except that we were allowed to call an expert to testify about the effects of trauma, surgery, and pain medication on a "hypothetical" person.

We are now preparing a motion for new trial. We are also preparing for sentencing, in a case that will likely result in a substantial sentence. We are considering whether we should represent the defendant on appeal or whether we should recruit new counsel who could review the record and make decisions about which issues to raise on appeal without the baggage of having made decisions regarding the representation

during trial.

The students who participated in this case did so from beginning to end. They interviewed the defendant, conducted the investigation with the assistance of a seasoned investigator, prepared pre-trial motions, put on witnesses at the hearings on the motions, argued the motions, and sat at counsel table during the trial. They became well-versed in the relationship (or lack of it) between conducting and presenting thorough research and winning and losing motions, the relationship (or lack of it) between presenting sensible and compelling legal arguments and success and failure, the incredible tension and hard work involved in trials, the dynamics between lawyers who represent opposing interests, and the awesome power of the jury in our system of justice.

When "crunch time" for trial preparation began, our clinical faculty and our students pulled together. They prepared a pre-trial plan, including final steps in investigation, discovery, and the filing of pre-trial motions. They prepared trial notebooks. They prepared the voir dire, opening statements, witness examinations, closing arguments, and jury instructions. They (students and faculty) were together almost full-time, for three weeks. Our clinical faculty and students who worked on this case put their collective heart and soul into the representation of this client.

The two week trial was a difficult one. Emotions ran high on both sides. The senseless tragedy that befell the victim could not be denied. On the other hand, the deficiencies in identification procedures and reliance upon an outdated scientific test raised serious doubts about the reliability of the State's case against our client.

The jury deliberated for two hours. It then sent a note to the judge that it was deadlocked, 11-1 for conviction. We asked for a mistrial. The motion was denied. Two hours later, the jury asked for a transcript of the victim's testimony. The judge turned to us and asked us for our position on the jury's request. We asked for time to think about it. Finally we agreed. Luckily, we had the transcript, but side bar conferences had to be deleted. While this was being done, the jury came back with

its verdict: guilty on all counts. The jury was out for about six hours.

III. Discussion: Criminal Cases as Laboratories to Support Education, Public Interest Advocacy, and Research

How do these stories tie together to support the proposition that clinical legal education in the criminal justice system provides, perhaps, the best form of clinical education for law students?

In attempting to answer this question, let me focus on five themes common to each of these cases: 1) caring about the client; 2) demonstrating and developing lawyering skills; 3) demonstrating a model of representation to students and to others engaged in criminal justice, including trial and appellate courts; 4) strategic decision making for the long-haul; and 5) placing representation in social and historical context in order to demonstrate why effective representation of criminal defendants matters to our society.

A. Caring About the Client

In an age when so many decisions regarding representation are made on business rather than professional considerations, representation of criminal defendants in the law school clinical context teaches basic, and perhaps now lost, values of the legal profession. In the old days, lawyers developed personal relationships with clients. Clients trusted lawyers as personal advisors and as friends. While there was a tension between the two roles (lawyer and friend), the conflicts were often resolved by the fact of a long history of close association. Now, many law students, especially those who enter big firm law practice, never see a client; they are in practice to provide support to the senior members who do. A law school clinical program may provide a student with her only opportunity to interview, to represent, and to care about a client from the time she enters law school until she makes partner. Hopefully, the lessons learned from this experience in law school will be remem-

bered long after graduation. This will be especially true if these lessons are learned in the context of the representation of criminal defendants.

Why? Because no client is so disenfranchised and faces more severe consequences as the result of his legal predicament than the indigent criminal defendant. These facts on the one hand make it a challenge to develop a meaningful lawyer-client relationship (a learning experience in itself) and make the relationship more meaningful as it develops. Often, the lawyer (the student lawyer) is the only friend the client has. If the relationship develops to its optimum level, a trust evolves that provides students with the opportunity to appreciate the value of a lawyer's advice and counsel. Because of the tensions that are inevitably involved in this relationship (breakdown of trust on both sides because of tensions over approach, potential and actual results, and the threat of severe adverse consequences to the client), the nature of the relationship and the extent of mutual trust shift, making the relationship dynamic and difficult to anticipate and to manage.

The development of a trust relationship with the client is key in criminal representation. Inevitably, the law students enter into the relationship knowing something about the nature of the legal challenges faced by the client, but knowing far less about the clients expressed and often unexpressed concerns and needs. The same dynamic is in place in any other lawyer-client relationship. Developing trust requires first a demonstration of caring. By this I mean more than an expression of empathy. Caring involves empathy and a demonstration of commitment to advance the client's interests. In the context of criminal representation, a law student must have an ability to communicate, to empathize, and to demonstrate that all that can be done will be done. The latter element of this trust relationship is particularly important in the context of criminal representation.

If law students are not provided with these experiences in law school, they may wait several years after graduation before they are given the authority to manage even complex relationships with clients. If a law student can develop a meaningful

and constructive relationship with a criminal defendant facing trial and imprisonment, it is likely that she will have the skills necessary to establish constructive lawyer-client relationships with even the most sophisticated business client. At a minimum, she will have as the result of her clinical experience in law school, the experience upon which to base continued learning in this most important area. Nearly all in the legal profession agree that the ability to make relationships with clients is key to successful representation and to successful practice.

B. Demonstrating and Developing Lawyering Skills

Because of the nature of the cases taken on by a criminal and post conviction clinical program, the model of representation must be one in which students and clinical faculty collaborate. Common sense dictates that the seriousness of the offense charge determines the extent to which students will play a lead role. For that reason, some would argue that serious criminal and post-conviction cases are not the ideal for clinical education because of the difficulties involved in students playing a lead role. I argue, quite to the contrary, that these cases are the best for providing a good clinical experience precisely because they force clinical faculty and students to work together. It is in this context that clinical faculty can best model lawyering skills and in which the modeling of lawyering skills becomes a credible way of imparting learning. In this setting, the clinical teacher puts her skills on the line, just as the student does, allowing her (the teacher's) skills to be modeled and judged by students.

This "colleague" model of representation in the law school clinical setting also requires that the clinician maintain a high level of skills—client interviewing, legal writing and research, investigation, case planning, organization and prioritizing of work, trial skills—necessary to model effective representation. In this context, the clinical professor's critiques of student performance are taken to heart. Students are able to see first hand what it takes to provide effective representation in the criminal context.

The involvement of clinical faculty at this level of intensity

in the representation of clients should not diminish in any way the role of the clinician in the academy. In fact, the "colleague" model of supervision should provide clinical faculty with current and valid information about the practice that is relevant and that encourages meaningful critiques of practice informed by actual experience. Without day-to-day experience working with clients in the justice system, it is difficult for faculty to construct meaningful messages about how students should practice.

This model of supervision, necessitated by the nature of the representation, also permits students and faculty to set joint goals and to assess whether those goals have been met. By this I do not mean solely whether the case was won or lost, but whether the preparation and decision making that constituted the representation were effectively implemented. If the outcome was a "win", what was it about preparation and strategy that dictated the outcome? If the outcome was a "loss" how could preparation and strategy have been modified to achieve a better result? It is impossible for clinical faculty to have this kind of discussion with a student unless there is a joint and deep personal commitment and experience in the representation of a client.

C. Demonstrating a Model of Representation to Students, and to Lawyers and Judges in the Criminal Justice System

The role of law schools is to provide legal education to students and to engage in activities (scholarship, the study of legal systems, continuing education) that will promote the fairness and efficiency of our legal system. Before the advent of new initiatives in clinical legal education that began in the late 1960's, the latter function of law schools was the task of full-time law teachers who, for the most part, did not practice. With the advent of clinical legal education, law schools have become more engaged in the teaching of practice, and clinical law professors have taken the lead in developing links between legal academia and the practice. For the most part, however, the practicing bar has been well ahead of law faculties in developing new approaches to practice. The leaders in practical initia-

tives to change the practice have, for the most part, been lawyers, not law professors or law schools.

This should change, particularly as the historical paradigm relates to criminal practice. There should be closer collaborations between the practice and the academy. While the private bar will take it upon itself to promote advances in the practice in practice areas in which there is a profit to be made, the same does not hold true in criminal justice. The clients who can afford to pay lawyers are few. The private criminal defense bar is relatively small, with some, but not overpowering influence on the way in which criminal courts and associated agencies operate. As a consequence, our criminal justice system cries out for independent appraisals and assessment. Much of this work is now accomplished admirably by such organizations as the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Organization. Until recently, however, law schools have had little to do with developing initiatives for reform.

Fortunately, this is changing, and it is changing primarily because law school clinical programs have become involved in criminal justice reform initiatives. These initiatives range from programs that involve students in criminal practice in order to encourage them to maintain an interest in the area after graduation, to programs that have taken on issues including the death penalty and wrongful convictions due to systemic failures such as false confessions to bad forensic work. Law school clinical programs have also taken the lead in modeling effective representation in juvenile courts and criminal courts and have provided technical support and training to defender organizations.

The educational benefits that flow to students who participate in such programs are many. Through representation of individual clients, students see the strengths and weaknesses of our justice system first hand. Almost any case could have been prosecuted, defended, and tried in a better fashion. While not every case seems at the beginning to offer the data for reform many individual cases do offer this opportunity, the stories included at the beginning of this article are based upon

cases that at the outset did not appear to hold promise as the basis for reforms. Yet, the range of problem areas brought to light by those cases—the need for thorough preparation, the identification of mental health issues, the elimination of judicial corruption, the admissibility of children's confessions, the reliability of eye-witness identifications—are systemic issues that clinical programs, if properly staffed by experienced lawyers directly engaged in the practice, have the capacity to identify and to address.

D. Strategic Decision Making for the Long Haul

Engagement of students in a criminal defense clinic can give them a chance to see how lawyers can simultaneously represent the interests of an individual client while identifying and addressing issues that affect the interest of a large group of persons similarly situated. Good defender organizations have recognized this fact. They pay attention to the systemic problems that affect the interests of their clients including the quality of police investigations, substance abuse, mental health, and after prison support. But these organizations are already over-taxed with the burden of representing individual clients. Law school clinical programs that involve students in criminal defense work have a particular advantage in this area because they have the luxury of picking and choosing cases.

In some jurisdictions, this very fact creates tension between defender organizations and law school clinical programs. But it need not. In fact, law school criminal clinics working together with defender organizations have the capacity to make significant impact if they work together. Examples of these kinds of collaborations are legion; the careers of Abbe Smith, Barbara Bergman, and Barry Scheck being three of the many examples of clinical teachers who have maintained active practices, who have forged constructive links to the practicing bar, and who have advocated for reform of criminal justice practice. Imagine how much law students learn from these skilled practitioners and effective teachers.

From their work, it can be seen that each of these teachers has identified issues that they feel should be addressed and

has pursued an agenda for "the long haul." Abbe Smith has practiced criminal defense and has written extensively on the ethical and emotional issues that surface in the representation of criminal defendants. Barbara Bergman has taken the lead in juvenile justice reform in New Mexico and nationally. She has also defended criminal and death penalty cases. She is President of the National Association of Criminal Defense Lawyers. Barry Scheck, a former president of the National Association of Criminal Defense Lawyers, heads Cardozo Law School's Innocence Project and is largely responsible for improving access to DNA technology for the wrongfully convicted. There are many clinical faculty who are following the lead of Smith, Bergman, and Scheck. Their activities have been a "win-win" for education, criminal justice reform, and the reputations of their law schools.

E. Placing Representation in Social and Historical Context in Order to Demonstrate Why Effective Representation of Criminal Defendants Matters

Representation of criminal defendants has historical and social meaning in our society. The evolution of the right to counsel is the story of race, of poverty, of class. It is now the story of an ever expanding prison population composed almost entirely of minorities and the poor. Representation of defendants in law school programs should be contextualized, so that students recognize the historical significance of the service they provide as well as the challenges they will face in the future. Law school clinical programs that focus on representation of criminal defendants are particularly well-suited to teaching lessons that will hopefully support a continuing and positive development of human rights in our country and around the world.

Here are some of those lessons:

1. There seems to be consensus in our society that our criminal justice system is as good as they come. It is widely believed that our system provides the fairest trials, has the highest degree of accuracy, and exercises the most restraint in its efforts to protect society. But is the consensus based upon

fact? A clinical program specializing in the representation of criminal defendants will allow future leaders of the bench and bar to make an informed decision about this crucial question.

2. There is consensus within the legal profession and within society at large that we can rely on government through defender organizations to provide adequate defense services. A student involved in a criminal defense clinic will be able to make a judgment about the correctness of that consensus.

3. Little attention is paid to the plight of those in our prisons and jails and to the long-term costs to our society of relying on the incarceration of so many. In part, this is because most in our society have never met a prisoner or have been inside a prison. A criminal defense clinic provides future leaders of the bench and bar with perspectives about the future of our prisons and jails as well as about our sentencing policy.

IV. CONCLUSION

Clinical programs that focus on the representation of criminal defendants can help future leaders of the bench and bar to identify practices that in the future we must change. The practices ripe for change suggested by the six stories at the beginning of this essay include judicial management of criminal dockets to ensure proper preparation of cases, the pervasiveness of mental illness in the criminal justice system, police misconduct, judicial misconduct, the need to evaluate the reliability of certain forms of evidence including confessions and "snitch" testimony, and the reliability of eye-witness identification. In law school clinical programs, teachers and students can "imagine" justice systems that do not have these flaws. If they can imagine more ideal systems, they will also wonder why we do not create them. Some students may do more than wonder. They may act. They may take the lessons learned in the clinic to their life's work. This is what teachers in criminal justice clinics hope for.

WHEN CLINICS ARE "NECESSITIES, NOT LUXURIES":* SPECIAL CHALLENGES OF RUNNING A CRIMINAL APPEALS CLINIC IN A RURAL STATE

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Before accepting the position of faculty director of the Defender Aid criminal appellate and post-conviction clinic at the University of Wyoming College of Law, I spent several years as an appellate lawyer in New York City.[1] While I never taught in New York,[2] I became quite familiar with urban appellate practice. Like New York, Wyoming has murderers, rapists, drug dealers, and assorted other felons, just not nearly as many of them.[3] The difference between an urban setting

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* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (finding as an "obvious truth" that lawyers are "necessities, not luxuries" in our adversarial system of criminal justice); *see also* Evitts v. Lucey, 469 U.S. 387, 393-94 (1985) (finding that lawyers are "necessary" in the first appeal as of right).

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[1] From 1993-96 and again from 1997-98, I worked at the Office of the Appellate Defender (OAD), a small, private, non-profit organization which trained appellate lawyers to handle court-appointed direct appeals from felony convictions occurring in Manhattan and the Bronx. OAD's representation of those appellate clients sometimes continued through state and/or federal post-conviction proceedings.

[2] During my later years at OAD, I taught informally by supervising a few in-house attorneys and young law firm associates who took appellate cases, under OAD supervision, on a volunteer basis.

[3] In 2000, Wyoming's crime index rate of 3298 reported crimes per 100,000 people was actually higher than New York's statewide rate of 3099.6. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES 2000, at 68, 74 (2000), *available at* http://www.fbi.gov/ucr/cius_00/00crime

and a rural setting like Wyoming, however, has implications as to how the law is practiced and to how practicing law is taught. A rural setting also presents teaching and law reform opportunities that are less available in more heavily populated areas.

In a rural state,[4] the law school's relationship with the state bar is critical both to teaching and legal reform opportunities.[5] Most rural states have only one or two law schools in the entire state, and at least one usually is a public land-grant institution.[6] Creation of land-grant institutions "introduced

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213.pdf (last visited Feb. 7, 2006). In raw numbers, however, New York has far more reported crimes than Wyoming. *Id.*; *compare* http://www.disastercenter.com/crime/wycrime.htm (last visited Nov. 11, 2005); *with* http://www.disastercenter.com/crime/nycrime.htm (last visited Nov. 11, 2005).

[4] For purposes of this article, "rural states" refers to states with a population density of less than seventy-five people per square mile. Thus, this term covers Alaska, Arizona, Arkansas, Colorado, Idaho, Iowa, Kansas, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, and Wyoming. *See* U.S. CENSUS BUREAU, POPULATION, HOUSING UNITS, AREA, AND DENSITY (2003), *available at* http://www.ceic.commerce.state.mt.us/C2000/PL2000/popdensityallstates.pdf. Of course, plenty of other states, or portions thereof, may also be considered "rural" and experience many of the same challenges faced by our least densely populated states.

[5] In Wyoming, for example, the vast majority of the bar, the judiciary, and a large part of state government are alumni of the state's only law school. *See* UNIVERSITY OF WYOMING COLLEGE OF LAW, ACADEMIC PLAN 2004-2009 (2003), *available at* http://uwadmnweb.uwyo.edu/law/Alumni/academic_plan.asp ("[O]ur alumni occupy the highest positions of leadership in the state, including the governor, all of the state supreme court justices, the state attorney general, the state treasurer, state secretary of state, many legislators, and judges").

[6] Alaska has no law school. Stu.Findlaw.com, USA Law Schools by State, *at* http://www.stu.findlaw.com/schools/usaschools/index.html (last visited Feb. 7, 2006). Nine rural states, Idaho, Maine, Montana, Nevada, New Mexico, North Dakota, South Dakota, Vermont, and Wyoming, each have only one law school, and (except in Vermont) that school is a state school. *Id.* Arizona, Arkansas, Colorado, Iowa, Kansas, Mississippi, Nebraska, and Utah each are home to two law schools, at least one of which is a state school. *Id.* Minnesota, Oklahoma, and Oregon each have three law schools. *Id.*

The Morrill Act of 1862 gave all states federal land-grants for the support of higher education on condition that they create universities designed to serve regional and national interests and, in particular, to provide agricultural and technical education. *See* 72 U.S.C. § 301 (2000); *see generally* Gregory J. Vincent, *Reviving the Land-Grant Idea Through Community-University Partnerships*, 31 S.U. L. REV. 1 (2003).

the notion of service and outreach to American higher education and created a reciprocal relationship between the land-grant university and the citizens of the state."[7] Any law school is expected to be a significant contributor to the life of the local legal community. When the law school's local community is the entire state, the expectations increase exponentially. The law school in a rural state is a primary source for statewide continuing legal education programs, and law professors are expected to consult with legislators and to serve on bar committees within areas of their expertise. When the law school is part of a land-grant university, there is more than an expectation that the law school provide service and outreach in the state, it is an obligation. Thus, it is hardly surprising that clinical programs in rural states are expected to carry a substantial portion of the burden of meeting the legal needs of the poor throughout the state.

This article will address the pressure on law school clinics in rural areas to fill in gaps in the availability of legal resources for the poor, and the resulting challenge that presents. Second, it will address the impact of such demands on the clinic's choice of and ability to fulfill its pedagogical (or andragogical) goals.[8] Finally, the article will address the opportunities presented for engaging in law reform and innovative practice. On balance, a law school criminal appellate clinic in a rural area presents more opportunities than it does problems. In a small state, where many students can be expected to go on to practice in the local community and indeed become leaders of the bar, contributing to improving the practice of law is one of the clinics' greatest challenges and its most important opportunities.

I. THE PRESSURE TO PRODUCE

The limited ability of poor persons to access and obtain meaningful relief from the justice system has been the focus of

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[7] Vincent, *supra* note 6, at 3 (footnote omitted).

[8] *See infra* notes 39-55 and accompanying text.

much recent attention and study.[9] Given the vast unmet legal needs of the poor throughout the country, virtually any clinical program will have to confront whether to provide needed legal services to more people or limit the quantity of cases to enhance the quality of the learning experience for the students. In a rural state, which has few other resources for providing access to justice for the poor, the state law school's clinic may be asked to play a significant role. Acceding to the pressures on clinics to provide legal services to those who may otherwise go unserved, however, can affect the quality of the learning experience, and the quality of the resulting representation.

Whether poor persons have adequate access to justice within the criminal justice system in particular was the subject of recent hearings conducted by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID). The resulting report, "*Gideon's* Broken Promise: America's Continuing Quest for Equal Justice,"[10] concluded that forty years after *Gideon v. Wainwright*,[11] "the

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[9] In 1994, ABA Division of Legal Services published a study which revealed that, in 1992, forty-seven percent of low-income and fifty-two percent of moderate-income households experienced a legal problem, but few turned to the courts for assistance. ROY W. REESE & CAROLYN A. ELDRED, AMERICAN BAR ASSOCIATION, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 9, 19 (1994), *available at* http://www.abanet.org/legalservices/downloads/sclaid/legalneedstufy.pdf. In recent years, several states have conducted similar legal needs assessments. *See* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, ACCESS TO JUSTICE SUPPORT PROJECT, *available at* http://www.nlada.org/Civil/Civil_SPAN/SPAN_Library (last visited Nov. 11, 2005); *see also* ASSOCIATION OF AMERICAN LAW SCHOOLS, EQUAL JUSTICE PROJECT REPORT, PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES (2002), *available at* http://www.aals.org/equaljustice/final%Freport.pdf; *c.f.* DEBORAH L. RHODE, ACCESS TO JUSTICE (Oxford Univ. Press 2004).

[10] STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDING (2004) [hereinafter *GIDEON'S* BROKEN PROMISE].

[11] 372 U.S. 335 (1963). The *Gideon* Court, of course, recognized the critical nature of the right to counsel and guaranteed that right to most indigent defendants.

promise of equal justice for the poor remains unfulfilled in this country."[12] Problems identified in the report include: (1) inadequate funding for criminal defense services, (2) inadequate legal representation, and (3) structural defects in indigent defense systems that impair attorney independence and fail to ensure quality services.[13] These problems are just as prevalent in rural states, or more so, than elsewhere in the country. Law school clinics anywhere present opportunities to help address some of these problems. In rural areas, however, clinics must resist the temptations to take on too much. With only one or two law schools to share the excess load, the pressure to increase the volume of clinic representation is ever present.

Inadequate funding for criminal defense drives down the numbers of experienced, competent criminal defense attorneys.[14] This, in turn, leads to higher caseloads for the attorneys who remain.[15] Lack of funds for indigent defense also means that the substantial caseloads must be managed with minimal resources for experts, investigation, and support services.[16] In addition, with little funding of their own for training, public defender offices often look to law school clinics as a place from which to draw young attorneys who already have some training and experience and thus can hit the ground running.[17]

Rural areas are likely to have fewer qualified criminal defense appellate lawyers to provide representation to all indigent defendants who choose to exercise their right to appeal. When indigent defense providers are faced with funding and staffing issues, the law school clinic may appear to be an

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[12] *GIDEON'S* BROKEN PROMISE, *supra* note 10, at 1.

[13] *Id.* at 7

[14] *Id.*

[15] *Id.* at 7, 9-10.

[16] *Id.* at 10-11.

[17] Every year that I have run the Defender Aid Program, I have fielded calls from public defenders in Wyoming and Colorado complaining that we only offer an appellate clinic, when a criminal defense trial clinic would better serve their needs to hire trained young lawyers.

attractive source of free and eager labor. In Wyoming, for example, the state public defender has a limited staff for handling appeals from convictions occurring anywhere in the state.[18] Even with fewer criminals, the load on Wyoming's appellate public defenders is more than ample. For these attorneys, it is still a struggle to manage the state's appellate caseload.[19] Given its limited resources and some legal restrictions, the state public defenders handle very few state post-conviction and no federal post-conviction matters.[20]

Most law school clinics see themselves as having both educational and social justice missions.[21] In areas where the

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[18] In 1998, the Wyoming public defender's appellate staff for the entire state was two attorneys; since then, it has grown to three and one-half. The "half position" is held by an attorney whose responsibilities are split between direct appeals and state post-conviction work (especially in the state's few capital cases).

[19] For example, an appeal from a capital case, with a lengthy trial record, can grind progress on other cases to a halt.

[20] Until recently, Wyoming's public defenders were not authorized to provide assistance with state post-conviction petitions. In 1990, Wyoming's Public Defender Act was amended to provide that qualified "needy person[s]" were entitled "[t]o be represented in any appeal to a Wyoming court and in cases in which the death penalty has been imposed or in such other cases as the state public defender office deems appropriate in a writ of certiorari to the United States [S]upreme [C]ourt, provided this paragraph *does not create a right to appointed counsel in proceedings under W.S. § 7-14-101 through 7-14-108.*" 1990 Wyo. Sess. Laws ch. 95 sec. 1 (emphasis added).

Prior to another amendment of the Act in 1999, the law school's clinic was the *only* entity which assisted indigent inmates with collateral post-conviction matters. Even now, public defenders are not encouraged to pursue post-conviction relief. Since 1999, the Public Defender Act has provided that a "needy person" may be "represented in any appeal to a Wyoming court, and in cases in which the death penalty has been imposed *or in such other cases as the state public defender deems appropriate*, in a writ of certiorari the United States [S]upreme [C]ourt, and in [state post-conviction] proceedings under W.S. 7-14-101 through 7-14-108." WYO. STAT. ANN. § 7-6-104(c)(ii) (2003); 1990 Wyo. Sess. Laws ch. 95 sec. 1-2 (emphasis added). Nonetheless, the post-conviction statute still provides: "[a]n indigent petitioner seeking relief under this act is not entitled to representation by the state public defender or by appointed counsel." WYO. STAT. ANN. § 7-1-104(c) (2003).

[21] Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1462-67 (1998); Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307, 309 (2001); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L.

legal needs are great, and other available resources for meeting those needs limited, these missions may conflict. Balancing the often disparate goals can be a delicate task.[22] Law school clinics aid the law schools' educational missions by inculcating students with the skills and values necessary to prepare graduates "to participate effectively and responsibly in the legal profession."[23] There also is little dispute that appellate litigation skills are an important facet of legal education,[24] and thus a valuable part of a law school's educational mission. But given those educational goals, and the clinical teaching methods used to achieve them,[25] clinics are "a relatively inefficient way of providing legal services."[26] Thus, clinics are ill-suited to provide high-volume representation without compromising the quality of the representation and the quality of the learning experience.

The Defender Aid Program at the University of Wyoming College of Law has become an important and necessary player in the provision of appellate and post-conviction services in the state. But to provide these services also involves a constant struggle to keep clinic caseloads at a manageable level, and at a level that ensures the quality of the resulting educa-

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REV. 1097, 1129 (2003); Kimberly E. O'Leary, *Clinical Law Offices and Local Social Justice Strategies*, 11 CLINICAL L. REV. 335, 337-40 (2005); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 999-1000 (2005); Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327 (2001).

[22] As clinical supervisors have become more integrated into the law school academic faculty, balancing the educational and social justice missions has become more challenging. *See* Wizner & Aiken, *supra* note 21, at 1003-04.

[23] *See* DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 2 (2002); *see also* SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, 2005-2006 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 20, 133 (2005); AMERICAN BAR ASSOCIATION, PROGRAM OF LEGAL EDUCATION, *available at* http://www.abanet.org/legaled/standards/chapter3.html (last visited Jan. 10, 2006).

[24] *See generally* Committee on Appellate Skills Training, *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. CIN. L. REV. 129 (1985). Indeed, appellate brief writing and argument are included in most first-year law school curricula.

[25] *See infra* notes 41-43 and accompanying text.

[26] CHAVKIN, *supra* note 23, at 15.

tional experiences and of the legal services provided. The clinic has in some years been called upon to handle twenty to twenty-five percent of the public defender's appellate case load, and is the state's primary provider of all other post-conviction services for indigent inmates.[27] Once the clinic is established in such a substantial role, it is difficult to scale back the quantity of cases it takes; thus the clinic can become the victim of its own generosity.

As the only criminal apellate defense clinic, at the *only* law school in the state, working in conjunction with the sole criminal appellate defense provider in the state, the political pressures to ease the burden on the public defenders are ever present. In a state with a small legal community, the continued success of the clinical program depends, in large part, on maintaining good relations with the state provider. So, when the state provider asks for the clinic's help, it is often hard to decline. One of the challenges for a rural law school clinic is to set reasonable workload limits, and to ensure those limits are understood and respected by the state provider or whatever source from which the clinic receives its cases. The hardest part of the task is learning to turn down possibly meritorious post-conviction cases, even though without the clinic's help an inmate may have no other resources for assistance.

Another way in which the lack of resources for indigent defense manifests itself in rural states is the increased potential for conflicts of interest. One problem identified in "*Gideon's* Broken Promise" is a "lack of conflict-free representation" for indigent defendants.[28] The report cites hearing witnesses from three states in which individual attorneys or attorneys in the same office sometimes represent defendants with conflicting interests.[29] A contract public defender from

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[27] In addition to direct appeals, our clinic's practice includes motions for sentence reduction, state post-conviction petitions, state habeas corpus petitions, and federal habeas corpus petitions.

[28] *GIDEON'S* BROKEN PROMISE, *supra* note 10, at 19.

[29] *See id.* (referring to witnesses from Montana, New Mexico, and Washington). Montana and New Mexico may readily be characterized as "rural," and much of Washington fits that description as well; even with denser population centers

Montana, for example, explained: "Lawyers in smaller, more rural counties in Montana are neither inclined nor trained to take cases when there are co-defendants or there is a conflict with the contract public defender. One contract defender advised me that the rural nature of his practice seems to encourage conflicts."[30] An upshot of these conflicts may be an increased request for the law school clinic to take potential conflict cases.

In rural states, the dearth of attorneys, particularly attorneys with adequate criminal defense experience, makes it difficult to provide competent, conflict-free representation in multi-defendant cases. Traditional imputed conflict of interest principles ordinarily would prevent any two attorneys within the public defender system, or at least within the same office, from representing clients with opposing interests.[31] The practical difficulties of finding an outside attorney with adequate criminal defense experience, however, often trump the rules. So, public defender colleagues within a single office, or from different offices within the state, may wind up representing co-defendants.[32]

Wyoming, like several other states, does not strictly apply imputed conflict rules to public defenders, favoring instead a

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like Seattle and Tacoma, the overall population density of Washington is eighty-nine people per square mile. *See* http://www.nemw.org/popdensity.htm (based on 2000 U.S. Census data) (last visited Jan. 10, 2006).

[30] *Id.*

[31] In any other setting, two attorneys who answer to the same supervisor undoubtedly would be considered part of a firm or "associated" in the practice of law, for imputed conflict of interest purposes. *See* Ward v. State, 753 So. 2d 705, 708 (Fla. App. 2000) (citing Bouie v. State, 559 So. 2d 113, 115 (Fla. 1990)) (viewing public defender office as a firm); Perkins v. State, 487 S.E.2d 365, 368 (Ga. App. 1997) (stating that a public defender's office is a firm); State v. Watson, 620 N.W.2d 233, 241 (Iowa 2000) (representing multiple defendants by attorneys from same public defender office is a conflict); *but see* Jackson v. State, 495 S.E.2d 768, 773 (S.C. 1998) (holding that contemporaneous representation of multiple defendants only presents a potential conflict of interest).

[32] *See, e.g.*, May v. State, 62 P.3d 574, 586 (Wyo. 2003) (holding that although the public defender's office had a potential conflict, and an attorney from that office made a limited appearance for the defendant, without a showing that a conflict of interest adversely affected a lawyer's performance, there is not a denial of the Sixth Amendment right to counsel).

case-by-case determination of whether there is an improper conflict.[33] In fact, the Wyoming Supreme Court frankly acknowledged that the state's rural setting, and the consequent limited number of qualified attorneys, were considerations in its resolution of this issue.[34]

When the appeals from across the state are funneled back to the public defender's small appellate staff, the conflicts may be repeated or amplified. In a rural state, there are likely to be far fewer experienced criminal defense appellate lawyers than there are trial lawyers. That makes for even fewer options, other than a clinic, for finding conflict-free counsel outside the public defender system.

Issues such as the imputed conflict of interest problem can present important teaching opportunities for law school clinics. First, there is the obligation to teach not only what the law requires, but to teach what the law and good practice ought to require in such a circumstance. That means evaluating the rules and practices in the community, and discussing strategies for changing them or for protecting clients' rights within the existing practices. The clinic usually provides the first, and sometimes the only time and place a young lawyer can reflect upon and develop the practice habits he or she will

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[33] *See* Asch v. State, 62 P.3d 945, 953-54 (Wyo. 2003) (favoring a case-by-case determination); *see also id.* at 952 (citing People v. Daniels, 802 P.2d 906, 915 (Cal. 1991)) (holding that automatic disqualification would hamper ability of a public defender to represent indigents in criminal cases); State v. Pitt, 884 P.2d 1150, 1156 (Haw. 1994) (requiring a case-by-case inquiry because public defender's office, as a government office, is different from a law firm); People v. Miller, 404 N.E.2d 199, 202 (Ill. 1980) (holding no *per se* rule is necessary; a case-by-case analysis is sufficient to determine whether any facts peculiar to the case preclude multiple representation within a public defender's office); State v. Bell, 447 A.2d 525, 528 (N.J. 1982) (holding that same potential for prejudice does not exist in a public defender's office).

[34] *Asch*, 62 P.3d at 953-54. The court noted that "given Wyoming's many small communities, with a limited number of lawyers, it could be difficult in many cases even to find local counsel for a defendant." *Id.* at 953. The court also mentioned another reason it refused to impute conflicts automatically within a public defender office—money. *Id.* While being careful not to "put a price on" legal representation for the indigent, the court suggested that requiring outside counsel in multiple defendant cases would "be quite an expense for the taxpayers of the state." *Id.* at 953-54.

employ in the future. So, the clinic should demand the highest standards of practice, even if the custom in the local bar is more lax.

The clinic bears responsibility for teaching future lawyers how to manage potential conflict situations. In Wyoming, for example, that individual public defenders will zealously advocate on behalf of their individual clients is taken as a given; the Wyoming Supreme Court's decisions on the imputed conflict issue assume that in the absence of any improper financial incentives, the lawyers will conduct themselves with the best interests of their respective clients in mind.[35] The clinic should then foster the professionalism and zealous advocacy which would make such an assumption appropriate. Moreover, the rule permitting representation of co-defendants by attorneys in the same public defender office is predicated upon the office having "effective measures [to] prevent communications of confidential client information between lawyers employed on behalf of individual defendants."[36] That predicate, however, may be hard to achieve in the rural offices where it may be needed the most. A public defender office in a rural community is likely to have limited space, and the individual attorneys will likely share support staff and an investigator. That makes it more difficult to prevent even unintended communication of confidential client information. So, the clinic should also provide the future lawyer with other tools, such as good office practices, to manage such potential conflicts, and to protect confidential client information.

Another unfortunate downside to the lack of other counsel for conflict cases, at least in rural Wyoming, is that when the public defender's appellate staff gets a case in which there is the possibility of an ineffective assistance claim, the case often gets referred to the clinic.[37] That means a disproportionate

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[35] *See id.* at 953.

[36] *Id.*; *see also* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 203 cmt. d.(iv) (proposed final draft No. 1 1996).

[37] This is especially true in trial cases that arise from the office in Cheyenne that houses trial public defenders and the state's entire appellate staff. Within that small office, trial attorneys frequently share information about cases and cli-

number of ineffectiveness claims get raised, or at least investigated,[38] in cases litigated by the clinic. Of course, few experienced criminal defense lawyers are pleased when their actions in a particular case are called into question by another lawyer; resentment increases when the questioning comes from a law student. Such cases must be handled with great delicacy to guarantee that the client receives zealous representation on appeal, and hopefully to avoid impairing the clinic's relationship with the state criminal defense bar. While the latter concern cannot be permitted to impair clients' interests, the clinic's relationship with the local bar is critical because many clinic students will later seek jobs as state public defenders, or in small criminal defense firms.

II. THE EFFECTS OF RURAL PRACTICE ON CLINICAL PEDAGOGY/ANDRAGOGY

For law schools in rural areas, part of the law school's mission is to prepare students for the types of practice that are prevalent in that particular region;[39] often, that means

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ents, and seek advice from their appellate colleagues while preparing for or in the midst of trial; this gives rise to potential conflicts even with the more lax approach taken by the Wyoming Supreme Court in *Asch*.

[38] More often than not, a thorough investigation reveals that a defendant's complaints that the trial counsel was ineffective are without merit. But, with some defense lawyers, even the investigation causes hard feelings.

[39] *See, e.g.*, The University of Montana School of Law, *Law School Mission Statement*, *at* www.umt.edu/law/welcome.htm (to prepare students for the "people-oriented practice of law" and to prepare competent practicing attorneys) (last visited Nov. 11, 2005); The University of South Dakota, *Law School Mission Statement*, *at* http://www.usd.edu/law/about_us/missionstatement.cfm (last visited Feb. 7, 2006). Therein the mission statement notes:

> The mission of the University of South Dakota School of Law is to prepare the lawyers and judges who will administer the federal, state, and American Indian tribal justice systems in South Dakota, and to provide a legal education which will serve as a solid foundation for the practice of law or other professional careers anywhere in the world.

Id.; The University of New Mexico School of Law, *Law School Mission Statement*, *at* http://lawschool.unm.edu/about/mission.php (noting the responsibility to educate future lawyers for practice in the state, and recognizing that because few graduates will receive additional training in a law firm setting, law schools must provide a strong foundation in legal theory and practice) (last visited Nov. 11, 2005).

preparing students for small firm or solo practice. Thus, a clinical program at such a school must provide students with opportunities not only to acquire legal knowledge, but also to develop independent professional judgment, practice skills, and values necessary for a future in which they may receive little additional training or mentoring. In addition, students who return to rural communities will find that many of their clients either cannot pay, or cannot pay full price for legal services. Clinics can help educate and sensitize these future lawyers about the needs they will find in their rural communities and encourage them to assist in serving the underserved. Thus, clinical legal education provides a valuable way to prepare students for a more rural practice.[40]

There is much debate about proper clinical teaching and supervisory methods, particularly as to the degree of direction that supervisors should provide.[41] David Chavkin's clinical education text adopts as its descriptive model for clinics, Donald Schön's term, "reflective practicum," meaning, "an educational setting in which 'students mainly learn by doing with the help of a coach.'"[42] Chavkin, however, acknowledges the limitations of the "coach" image for clinic supervisors; rather

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[40] *See* Gary Bauer, *Addressing the Needs of Solo/Small Firm Practitioners Through Law School Based Programs to Reduce Stress in Practice – Several Approaches*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 1, 7-10, 13-14 (2003).

[41] In recent years the prevailing view in clinical legal education has embraced adult learning theory (andragogy) favoring more non-directive supervision as opposed to more directive, teacher-driven pedagogy. *See, e.g.*, Margaret Martin Barry, *Clinical Supervision: Walking that Fine Line*, 3 CLINICAL L. REV. 137, 165 (1995); Frank Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982); Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 213-14 (1996); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 135-37 (1993); James H. Stark, et. al, *Directiveness in Clinical Supervision*, 3 B.U. PUB. INT. L.J. 35, 45-47 (1993). *But see e.g.*, Brook Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. (1999); *and* Linda Morton, et al., *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 CLINICAL L. REV. 469, 480-81 (1999). In practice, however, most clinical teachers fall somewhere in the middle, using both directive and non-directive supervisory techniques. *See* Medwed, *supra* note 21, at 1132-33.

[42] CHAVKIN, *supra* note 23, at 1.

than directing students or "calling plays," effective clinic supervisors assist "students in discovering the best ways to approach particular lawyering tasks and in helping students reflect on their experiences and the lessons to be drawn from them."[43] Students in rural areas, who can be expected to enter a small or solo practice, need to learn how to find answers for themselves, and need opportunities to develop their own professional judgment. Finding the appropriate supervisory balance, then, is important to fulfilling these goals. In a criminal appellate clinic, particularly one that represents indigent defendants in their only appeal of right, too little direction, however, can conflict with the defendant's right to receive effective assistance of counsel.[44] Non-directive supervision must be coupled with opportunities to evaluate and critique the directions the students choose, before it is too late and the quality of representation suffers.[45]

In many clinical settings, with vast numbers of cases from which to select, the clinic must develop mechanisms for selecting those cases which best serve educational and other goals.[46] For an appellate clinic in a rural state, that is far

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[43] *Id.*

[44] When the clinic represents indigent defendants on direct appeal, the clinic's responsibilities take on constitutional dimensions. A defendant has the right to the effective assistance of counsel on a first appeal of right. *See* Evitts v. Lucey, 469 U.S. 387, 396-97 (1985).

[45] Again, there is a wealth of clinical legal scholarship addressing the struggles of clinic supervisors in dealing with their dual roles as attorney to a particular client and educator. *See* George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415 (1991). Professional and ethical obligations to the client require the supervisor to make sure that the client receives highly competent representation; the student-attorney, however, may sometimes fall short of that mark. When and how to correct such problems is a constant concern for the clinical supervisor. *See, e.g.*, Stacy Caplow, *A Year in the Practice: The Journal of a Reflective Clinician*, 3 CLINICAL L. REV. 19, 27 (1996); David Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1531-32 (1988); Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 182-84 (1995); Stark, *supra* note 41, at 45-47.

[46] For discussions of the importance of considering their educational value when selecting cases for a clinical program, *see, e.g.*, O'Leary, *supra* note 21; Donald Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical*

less of a concern or an option. While there is certainly no shortage of appellate cases, neither is there a super-abundance. With fewer cases from which to choose, pre-screening is of little value. When the clinic is ready to take on a case, or if the public defender requests our assistance because of their particularly heavy caseload at the time, the public defender simply assigns us one. We have an understanding about the record size that is appropriate for a clinic case,[47] but beyond that we have few other specific requirements.[48] With our respective small staffs, neither the state public defender's office nor the clinic has the resources to extensively pre-screen cases before they are assigned to the clinic.

Once a case gets to the clinic, it is screened by the clinic supervisor to make sure that it presents *something* that can be raised on appeal. Even if the issues are not particularly strong, we will usually keep the case and move forward with the appeal.[49] With only one faculty supervisor for the clinic, we do not have the luxury of reviewing and rejecting multiple cases until we come across one which appears to have one or

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Legal Education Opportunity, 31 U. MICH. J.L. REFORM 1, 9 (1997); Kenneth Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 320-22 (1981). Of course, other selection criteria may also be considered.

[47] For our clinic, key selection criteria for direct appeal cases include the time constraints of the project and student availability. Whenever possible, we try to limit the records to fairly short, two to three-day trials. Because most students are only in the clinic for a single semester, it is difficult to get through larger records and complete the appellate brief in a timely fashion.

[48] With the exception of conditional pleas, the public defender generally tries to avoid sending the clinic guilty plea cases because they often do not involve any appealable issues. Of course, one non-negotiable limit is that Wyoming's student practice rules provide that the clinic cannot represent an appellant without his or her consent. RULES OF SUP. CT. OF WYO. PROVIDING FOR THE ORG. & GOV'T OF THE BAR ASS'N & ATTORNEYS AT LAW OF THE STATE OF WYO. 12 (1989).

[49] While this is the case for direct appeal cases, which we receive from the state public defender's office, more meaningful screening processes are applied to our cases seeking collateral post-conviction review. We consider a variety of factors when deciding whether to pursue post-conviction relief, including the significance of the legal issues presented, the existence of procedural problems, the available proof, the severity of the sentence being served, timing/deadlines, and availability of student resources.

more strong appellate issues. The learning goals of the clinic are set knowing that the luck of the draw will give us both strong and weak cases. Our goal is to teach criminal appellate litigation skills. Even a weak case can present valuable learning opportunities—about client relations, the appellate process, working with a record, issue selection, candor to the court, creativity, advocacy, and professionalism.

Even with the "luck of the draw" case selection, students frequently get to litigate important issues. Many rural states, like Wyoming, have no intermediate appellate courts.[50] That means the criminal defendant's first, and only appeal of right goes directly to the state's highest court. In Wyoming, the state's smaller population leads to fewer cases thus, some issues which are resolved in other jurisdictions, may still be open questions. As a result, any issue raised on appeal takes on added importance—the court's decision on any issue becomes the law for the entire state. Law students in the appellate clinic have opportunities to help mold the state's law. While this increases the pressure students may feel, it also presents great teaching opportunities. In the appellate clinic students must engage in thorough exploration and critical analysis of the legal questions and their implications. Having been through such experiences in the clinic, the students see the value of such critical analysis when they enter their own practice.

In rural states, the distance between communities can present resource issues for the clinic, and may limit the ability to provide a broad range of lawyering experiences to clinic students. First, the state prisons are likely to be a considerable distance from the law school, making in-person contact with appellate clients difficult.[51] Second, even if the law

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[50] Those states are: Delaware, Maine, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, West Virginia, and Wyoming. *See* Stephen J. McEwen, Jr., *The Intermediate Appellate Courts of Pennsylvania*, 26 JUST. SYS. J. 93, 94 (2005). Almost all of these would be considered rural states. *See supra* note 4.

[51] The primary men's prison in Rawlins, Wyoming is about 100 miles from the law school, and the primary women's prison in Lusk, Wyoming is about 200

school is a manageable distance from the appellate court in which students will litigate direct appeals, a statewide appellate and post-conviction practice also sometimes requires practice in courts in distant parts of the state.[52] Although the courts are very accommodating, permitting telephone appearances when appropriate, some things simply must be done in person.

The time, distance, and related expense issues presented by a rural statewide practice were recently underscored for me during a three week period in June. In that period, Defender Aid had two matters set for hearing and/or argument in Casper, Wyoming, which is about 180 miles away from the law school. One matter required a final trip for discovery and investigation (there had been other trips in prior months) and, shortly thereafter, a second trip for an 8:30 a.m hearing in state district court.[53] The other matter was an argument in federal district court[54] a week later. Each round trip to Casper results in at least six hours in the car. It is extremely difficult to put this time to productive use. Although the investigative and courtroom experiences for the students were invaluable, three trips to Casper in less than three weeks were expensive and the equivalent of about two working days was

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miles away. Exacerbating that problem, the relatively high incarceration rate in our small (in population) state has resulted in numerous male and female prisoners being housed in Colorado and Texas, and in the recent past, they have also been housed in Virginia, Oklahoma, and Nevada. Of course, the distance to the prisons is not a problem that is limited to rural states. In many states, the state's prisons are located in more rural settings far from population centers and law schools. Indeed, I have visited more clients in the Wyoming prisons than I ever was able to visit in New York.

[52] Although the filing and arguing of the appeal itself may occur at the state supreme court, there are occasions when problems with the trial record, or potential ineffectiveness claims (which Wyoming law requires to be raised on direct appeal, see *Calene v. State*, 846 P.2d 679, 687 (Wyo. 1993)), may require extensive communication with and even travel to distant parts of the state.

[53] Given the travel time involved, the early hearing also led to the expense of an overnight stay before the hearing.

[54] Wyoming has only one federal judicial district, but there are federal district courthouses in both Cheyenne and Casper. A federal habeas petition filed at the District Court Clerk's Office in Cheyenne may be randomly assigned to the judge in Casper.

lost in travel time alone. Thus, the time, distance and expense involved sometimes leads the clinic to decline cases which would have presented valuable educational experiences.

Rural Communities and Innovative Practice

One of the positive developments identified in "*Gideon's* Broken Promise" is the growth of holistic approaches to criminal defense. One significant finding in the report was: "Model approaches to providing quality indigent defense services exist in this country, but these models often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support."[55] In other words, some jurisdictions have experimented with innovative approaches and achieved success, but these approaches are not cheap. It takes substantial resources to continue or to adopt creative ways to provide quality indigent defense services. One recent model approach "sometimes referred to as 'holistic,' 'problem-solving,' or 'whole-client' advocacy . . . endeavors to address underlying problems in clients' lives that may lead to repeat criminal offenses."[56]

In a rural state, access to the variety of resources necessary to make such an approach work may be limited. For example, not every small community will have specific programs available for substance abuse treatment, mental health services, and other special needs presented by indigent defendants and inmates. Problems of distance from resource providers make such advocacy a challenge, but also heighten the need for it.[57] The distance issues present far more difficult

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[55] *GIDEON'S* BROKEN PROMISE, *supra* note 10, at 40.

[56] *Id.* at 37; *see also* Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences & Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1071-72 (2004); Cait Clarke, *Problem Solving in the Community: Expanding the Conceptual & Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 433-36 (2001); McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 480-83 (2004); *see generally* Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153 (2004).

[57] Indeed, most of the successful efforts at "holistic" or "community-based"

obstacles for the client who likely will have neither the ability nor the wherewithal to seek out resources that may only be available miles away from his or her home community. Thus, an indigent defender who can help connect a client with resources available throughout the state and educate the court about the services available, can have a positive impact on the client's life regardless of the outcome on the particular charges. Of course, a program that permits indigent defenders to take the time to engage in holistic representation will not be cheap; an already overworked indigent defender cannot also be a fulltime social worker. Thus, more personnel, more community resources, and a statewide recognition of and commitment to the value of such services are essential to successful holistic representation. But, successful holistic representation also substantially benefits the community, in reduced recidivism and in the defendants' improved ability to be productive members of the community.

Appellate clinics, which deal primarily with questions of law that arise from a prior trial, may seem ill suited to provide holistic representation. Often, there is little that can be done to improve the immediate circumstances of an incarcerated appellate client. At minimum, a holistic approach to appellate representation may require an understanding of the workings of the corrections system, the services available within the system, and the steps the inmate must take to access needed services. In addition, holistic post-conviction representation can involve assisting the inmate with identifying services that may be necessary when the inmate is released.

Some drawbacks to working in a rural state, such as, small populations and small governments, also present great opportunities. Without the large entrenched bureaucracies

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representation have occurred in urban settings. *See, e.g.*, MCGREGOR SMYTH, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS (2005), *available at* http://www.nlada.org/DMS/Documents/1110924022.69/document_info (last visited Jan. 10, 2006); Taylor-Thompson, *supra* note 56 (describing various programs, mostly in urban areas).

common in more urban settings, change may be easier to accomplish in a rural state or community.[58] Also, while public defenders in rural states have full caseloads (that seem to be trying to catch up with our urban neighbors), they remain, for the time being, manageable. Without crushing caseloads, rural defenders have opportunities to be creative. With the infusion of minimal additional resources, their offices can become laboratories for trying to improve the criminal justice system.

Clinics, appellate or otherwise, can be valuable contributors to the dialogue and experimentation process. Many of the characteristics that make clinics inefficient for large volume representation are assets for encouraging creative, innovative lawyering. As students reflect upon their experiences in the clinic, on the experiences of their clients, and on the actions and reactions of other parties in the criminal justice system, they will discover areas of needed reform. The time and resources for such reflection, and action upon those reflections, may be hard to come by when attorneys become wrapped up in busy practices. Students who, in the clinic, had the time to recognize systemic problems and experience the value of holistic representation may be more willing to continue that experimentation when they enter the practice. Moreover, in a rural state, those students are likely to become the leaders of their communities, the bar, and the state. In such positions they can advocate for the resources that would enable indigent defenders to "participate effectively and responsibly in the legal profession."[59]

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[58] For example, a few academics and attorneys in Wyoming became interested in the budding national jury reform movement. *See* Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 108-11 (1998). They brought their ideas to the Wyoming Supreme Court, which promptly created a jury commission in 1998. *See* Wyoming Commission on Jury System Improvement, *Re-Examining Wyoming's Jury Trial Procedures*, 1 WYO. L. REV. 93, 95 (2001). Within eighteen months the commission had proposed some innovative jury reforms. *Id.* at 96. By October 2000, many of those proposals were approved by the Wyoming Supreme Court. *See, e.g.*, WYO. R. CIV. P. 39.1-39.4, 51.

[59] *See supra* note 23 and accompanying text.

THE CLINICIAN AS ETHICAL ROLE MODEL IN THE CRIMINAL APPELLATE LITIGATION CLINIC

J. Thomas Sullivan[*]

I. INTRODUCTION

An appellate litigation clinic offers law students a unique opportunity to experience the actual process that creates much of the law school's traditional curriculum. The clinical experience, unlike traditional courses or simulation-based classes, forces students to address the same kinds of problems that practitioners face, the exception being the problems of setting and collecting fees. The student in an appellate clinic confronts the very difficulties absent from the usual moot court experience that is often advertised as an opportunity for students to learn about litigation through brief writing and oral argument. But the real-world experience is one of deficient trial records,[1] unpreserved error,[2] and existing caselaw that

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[*] Judge George Howard, Jr. Distinguished Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock. I would like to thank my able colleagues, Professors Lindsey P. Gustafson and Jessie W. Burchfield of the UALR faculty who provided valuable editorial assistance in the writing of this article, Lindsey for her insights into structure and transition and Jessie for her technical assistance in reviewing the manuscript.

[1] In *Duplantis v. State*, 644 So. 2d 1235 (Miss. 1994), the court declined to review the merits of the issue raised on appeal where the record was insufficient to demonstrate factual support for the appellant's claim that he had been denied a required disclosure of a witness's statement or the transcript of the preliminary hearing. "Duplantis's failure to present a proper record to this Court prevents review of this issue." *Id.* at 1250.

[2] Under Mississippi law, failure to properly preserve a challenge to sufficiency of the evidence to support a conviction waives appellate review of this issue. Holland v. State, 656 So. 2d 1192, 1197 (Miss. 1995). In *Holland*, the state supreme court held that the evidence was insufficient to support the conviction, but

is not deliberately equally balanced to ensure that both sides in the appeal have a fair and equitable chance in argument.

The clinical education experience also achieves a broader goal than the training of individual students. It brings the world of practice into the law school. In this sense, the jurisdiction and its courts become active partners with the law school in the educational experience, and the law school engages the court system in the discharge of the representation function.[3] The criminal appellate clinic functions much like an appellate defender's office, although on an admittedly much smaller scale. Not only do student attorneys serve the important role of providing representation for the clinic clients, but the clinic itself may make valuable contributions to the development of the law of the jurisdiction. Because the clinic will handle a number of cases under the supervision of an experienced appellate lawyer, it offers the potential to identify significant issues that may lead to development of the law. The clinic can also provide a reference point for trial lawyers throughout the jurisdiction who are concerned about issues and preservation of errors arising during the course of pretrial and trial litigation.

For all of these reasons, the professionalism of the clinic director and supervising attorneys remains of paramount importance in the educational experience afforded clinical students, in the performance of the clinic in representing clinic clients in the appellate courts, and in the representation of the law school before those courts. The experience demands that clinicians recognize the unique position of role model created by the student/teacher relationship in the context of the clinic experience and strive to maintain high standards of ethical behavior and effective performance in directing the appellate litigation clinic.

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that the claim was barred due to counsel's failure to preserve error. *Id.*

[3] "[A] State may also allow properly supervised law students to represent indigent defendants." Jones v. Barnes, 463 U.S. 745, 757 n.3 (1983) (Brennan, J., dissenting).

II. The Dual Role of the Clinician

The clinical professor and supervising attorney in any live-client clinical setting work in dual roles: they are responsible not only for ensuring the quality of the educational experience for the student, but also for guaranteeing that the institution affords its live-clients adequate representation. In reality, clinical student representation is typically more than adequate, and not infrequently may exceed the quality of representation afforded similarly situated clients by the practicing bar. This is probably attributable to the fact that the educational experience dominates the representation, rather than the financial aspect of representation in private cases or the often-unrealistic caseloads handled by publicly-funded attorneys. The educational experience is typically guided by experienced attorneys committed to clinical instruction who have been hired based on their own academic success and reputation in practice.

Further, clinical students are highly motivated to perform at high levels of competence, both because of the prospect of evaluation by their instructors and the significant commitment to the experience that is required for completion of the usual clinical course. Because course caseloads are managed to permit students adequate time to properly learn to litigate without the pressures that often compromise performance in private practice, students are able to focus far greater time and energy on individual cases than will be common in their practices later.

The competence, professionalism, and dedication of the clinical professor are pivotal to the success of the clinical student and the overall success of the clinic as counsel for the client.

A. The Clinician as a Role Model for Clinical Students

Clinical faculty are often viewed as being different from traditional faculty in terms of teaching methodologies employed, scholarship expectations, professional experience as a factor in hiring decisions, and, regrettably, status within the

faculty as a whole. Different faculties and institutions approach clinical education differently, of course, reflecting institutional commitment ranging from sincerely held convictions that clinical education is an essential element of the curriculum to grudging accommodation of student demands that legal education be made more "relevant" in terms of preparing students for practice. Within a given law faculty, the perception of the role and value of clinical faculty within the total program will almost certainly vary among individual professors, but the formal status of clinicians will either tend to validate the importance of clinical education within the institution or reflect a perspective in which clinical education is relegated to a subordinate position within the institutional hierarchy. What is almost certainly true about clinical faculty is that their involvement with students in on-going matters of representation of live-clients requires them to serve not only as instructors, charged with explaining much of the law to their students, but also as role models, demonstrating on a daily basis the proper ways in which lawyers perform, discharging their obligations to their clients and to the legal system.

1. The Unique Relationship Between Clinician and Clinical Students

An important feature of clinical education that justifies its labor intensive character and substantially higher per student cost than traditional classroom instruction lies in the socialization of the law student through the clinical experience. In contrast to the traditional classroom course, in which the professor dominates the environment and interaction between the students and professor will tend to be more formalized, if only because it must be designed to engage non-participating students simultaneously in the learning process, the relationship between clinical student and clinical instructor must necessarily be more intimate.

The difference is demanded by the nature of instruction: regardless of whether a traditional class is conducted in the format of Socratic dialogue based on appellate opinions, the give-and-take of discussion of hypothetical problems or simula-

tion exercises, or the less-interactive lecture format, traditional courses all typically are characterized by their reliance on non-live or hypothetical clients. In contrast, the clinical experience is dominated by the existence of a live-client involved in an ongoing litigation or transactional experience that would likely be duplicated in the context of a public or private law practice if the client was not represented by law students enrolled in a clinical law program.

2. Modeling Ethical Appellate Advocacy

A discussion of the ethics component of a criminal appellate clinical curriculum should focus not only on accepted general principles for the conduct of appellate litigation, but also on the role of the advocate in the adversarial process and the broader questions of how the lawyer should represent the client ethically, aggressively, and effectively. Not only does the appellate lawyer owe primary duty to the client, but often there are secondary considerations that may bear on the conduct of an appeal, including the value of appellate litigation in promoting the rule of law and consistency in its application.[4]

At the outset, the clinician should consider the potential sources of ethical commands that may bear on appellate practice and form an integral part of the instructional approach taken in an appellate clinic that includes representation in criminal appeals. Generally, the Model Rules of Professional Conduct incorporate recognized professional norms that gov-

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[4] For instance, the ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 21-1.2 PURPOSES OF THE CRIMINAL APPEAL, describe the functions of the direct criminal appeal as:

> (a) The purposes of the first level of appeal in criminal cases are:
> (i) to protect defendants against prejudicial legal error in the proceedings leading to conviction and against verdicts unsupported by sufficient evidence;
> (ii) authoritatively to develop and refine the substantive and procedural doctrines of criminal law; and
> (iii) to foster and maintain uniform, consistent standards and practices in criminal process.

ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 21-1.2 (1980).

ern practice.[5] But in the context of criminal cases, a second set of norms is also significant. The general considerations of effectiveness recognized as a component of the Sixth Amendment guarantee of assistance of counsel provide additional guidance,[6] particularly in light of the Supreme Court's recognition of the ABA Standards for Criminal Justice as authoritative directives for the conduct of representation.[7] Third, the problem of frivolous appeals must typically be addressed by

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[5] The three elements of the Model Rules most applicable to appellate practice are perhaps:

1). Rule 1.1, which directs: "A lawyer shall provide competent legal representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2001). This rule requires counsel to represent the client ably and professionally in very general terms.

2). Rule 3.3, which directs counsel to disclose known controlling authority to the court and opposing counsel:

> A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2001), and;

3). Rule 3.1, which authorizes appellate counsel to ask the appellate court to overturn or modify existing precedent when a good faith reason for doing so exists:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes *a good faith argument for an extension, modification or reversal of existing law.* A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003) (emphasis added).

[6] In *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000), the Court recognized the application of the two-prong test for evaluating claims of ineffective assistance of counsel adopted in *Strickland v. Washington*, 466 U.S. 668 (1984), to challenges based on counsel's representation on direct appeal. The test requires a showing of both defective performance by counsel and the reasonable probability that but for counsel's error or errors the outcome of the proceeding would have been different. *Robbins*, 528 U.S. at 285-86.

[7] Wiggins v. Smith, 539 U.S. 510, 524 (2003) ("Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as 'guides to determining what is reasonable.'") (quoting *Strickland*, 466 U.S. at 688 and citing Williams v. Taylor, 529 U.S. 362, 396 (2000)).

the criminal lawyer[8] and should be part of the discussion of ethical performance in the criminal appellate clinic. Finally, apart from the "rules" that govern representation in criminal appeals, the appellate lawyer routinely makes decisions that implicate professional values, but do not necessarily suggest ethical or unethical behavior. These include the determination of which issues should be raised in the appellate brief,[9] the decision whether to challenge precedent that would otherwise require the appellate court to reject claims factually supported by the record,[10] the decision to raise unpreserved claims of error,[11] and the decision to seek discretionary review.[12]

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[8] See *Robbins*, 528 U.S. at 278 n.10, affirming counsel's obligation under *Anders v. California*, 386 U.S. 738, 744 (1967), to review the record on appeal to determine existence of potential claims before certifying to the appellate court that in his opinion the appeal is frivolous. Under *Anders*, the Court had suggested that counsel also be required to identify potentially meritorious claims in his brief to the appellate court. *Robbins*, 528 U.S. at 268.

[9] For the author's views on the question of issue selection, see J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The "Ethical" Issue of Issue Selection*, 80 DENVER U. L. REV. 155 (2002).

[10] Similarly, for the author's views on the problems posed by unfavorable precedent, see J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Precedent*, 59 U. MIAMI L. REV. 341 (2005).

[11] For instance, in *United States v. Olano*, 507 U.S. 725, 732-34 (1993), the Court affirmed the authority of a federal circuit court reviewing an unpreserved claim of error to grant relief from prejudice caused by the error pursuant to Federal Rules of Criminal Procedure 52(b). Mississippi appellate courts retain authority to review unpreserved claims. Tate v. State, 784 So. 2d 208, 214 (¶ 25) (Miss. 2001). ("[I]n order to prevent a miscarriage of justice, this Court retains the inherent power to notice error notwithstanding trial counsel's failure to preserve the error.") (citing Johnson v. Fargo, 604 So. 2d 306, 311 (Miss. 1992)); *accord* Johnson v. State, 452 So. 2d 850, 853 (Miss. 1984); *cf.* MISS. R. EVID. 103(d) (Mississippi Supreme Court may notice plain errors that affect substantial rights).

[12] THE ABA STANDARDS FOR CRIMINAL JUSTICE recognize counsel's duty to continue to provide representation in the discretionary review process, whether in representing the litigant petitioning for review or in responding to a petition for discretionary review brought by the prosecution following a reversal of the client's case by the intermediate court. Standard 21-3.2 Counsel on Appeal, provides, in pertinent part:

> (d) In a jurisdiction with an intermediate appellate court, counsel for a defendant-appellant or a defendant-appellee should continue to represent the client if the prosecution seeks review in the highest court, unless new counsel is substituted or unless the highest court permits counsel to withdraw. Similarly, in any jurisdiction, such appellate counsel

The extensive range of issues and sources for considering ethical and professional behavior may themselves form a substantial core of instructional materials for teaching even the conventional law school course in professional responsibility.[13] But in a clinical setting, in which representation in ongoing litigation is the primary means of transmission of professional skills and values, the amount of time devoted to formal consideration of all potential issues in a traditional context would likely impinge on the ability to focus on representation and the need to provide effective representation to clinic clients. Consequently, the clinician's role is critical in terms of affording students a role model demonstrating an approach to representation and litigation that will provide them with a framework upon which to address new problems they will ultimately encounter after graduation. It is precisely

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> should continue to represent the client if the prosecution seeks review in the Supreme Court of the United States.

ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 21-3.2 (1980). But, in *Ross v. Moffitt*, 417 U.S. 600 (1974), the Supreme Court rejected the argument that indigent state court defendants were entitled to assistance of appointed or publicly compensated counsel in petitioning for Supreme Court review of federal constitutional claims decided adversely to the defendant by the state courts. The Court also held that counsel is not required to file discretionary appeals even when requested by the client if the issues raised are not meritorious and would potentially subject counsel to sanctions. Austin v. United States, 513 U.S. 5 (1994).

[13] Professors Justine Dunlap and Peter A. Joy observe:

> As is true with all good teaching, one must decide upon the overall goals for the classroom component and the goals for each class session before planning the substantive content of the classes. In some clinical programs, the classes are used to focus on lawyering skills, such as client interviewing, counseling, negotiation, pretrial, and trial skills. Other clinical programs focus upon the substantive law and procedure of the clinical course's particular subject matter, such as community development, consumer law, criminal defense, or family law. In these latter programs, the class sessions usually focus on aspects of the procedure and substantive law involved in representing clinic clients. Still other clinical programs use the classroom component for case conferencing or case rounds focusing on the students' cases and strategies they are considering.

Justin A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLINICAL L. REV. 49, 75 (2004) (hereafter *Reflection-in-Action*).

because the full range of potential ethical problems that arise in practice cannot be discussed thoroughly during the traditional component of a clinical class or anticipated in representation in the clinical experience that the clinician as role model offers the greatest insight into ethical and professional behavior.[14]

Nevertheless, the clinician should present an organized, comprehensive approach to the doctrines touching on effectiveness in appellate representation, and the remainder of this article is devoted to one possibility in this respect. Other models will undoubtedly offer alternative benefits, still others may be better suited to the particular personal experience of the clinician or culture of the jurisdiction in which the clinic operates. But any organized approach requires a starting point and this article offers one.

B. The Clinician's Role in Ensuring Competent Representation

The clinician's success as a role model for clinical law students is dependent on a number of factors, some of which are similar to general characteristics that facilitate successful practice. For example, the clinical instructor blessed with charisma in the teaching setting may well be relying on a personal trait that also translates well into performance before a jury in trial. Some clinicians may be lacking in charisma, but offer a degree of interpersonal understanding and empathy that fosters a positive learning environment, particularly for students less than confident in the social skills assumed to be required for success in practice.

But in a concrete sense, the clinician must always be

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[14] "In the clinic, much of the important learning occurs in the course of lawyering, not in the confines of the classroom. While the classroom component is important in assisting clinical students to become effective and reflective practitioners, do not overstate its importance either to your students or yourself." *Id.* at 77. Dunlap and Joy draw upon the work of DONALD SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER (1987), who advocates that the work of professionals must be taught within the experience of practice. *Reflection-in-Action, supra* note 13, at n.4.

grounded in the law and practice skills necessary for the clinical experience. For the clinician directing an appellate clinic, and particularly one specializing or emphasizing criminal appellate representation, the clinician's behavior and practices must necessarily reflect the best model for practice. The need to ensure that the clinic's representation reflects competence and professionalism dictates that the clinician address supervision of the student's work on the appeal in an organized and diligent fashion, demanding that the student also approach the case in a similarly organized and diligent fashion. Otherwise, the representation may fail and the client's legitimate expectations may be frustrated in the process. In order to maximize the prospects for successful representation, the clinician as role model should approach the clinic case relying on the same "best practices" that would be employed in private practice.

1. Reviewing the Record

Initially, the clinician must be familiar with the trial record, which serves as the record on appeal, in order to properly consult with the student and ensure that the student then properly advises the client. The advice to the client encompasses both the identification of issues that may be argued in the brief and assessment of the potential for success on appeal. Chief Justice Burger, writing for the majority in *Jones v. Barnes*, noted: "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review."[15]

2. Identifying Potential Issues and Arguments

Once thoroughly familiar with the record of the proceedings in the court below, the clinical instructor and student attorney must evaluate potential issues that may be raised in the appellate brief and the likelihood of success in order to

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[15] 463 U.S. 745, 752 (1983).

properly advise the client.[16] In *Jones v. Barnes*, the majority concluded that the ultimate decision concerning which issues should be argued in the appeal is committed to the discretion of counsel, rather than the appellant.[17] Counsel's decision not to pursue a particular issue desired by the client does not result in ineffective assistance.

At this point, counsel's professional judgment must ultimately override a student's objection that a point should not be raised or lacks support in the record. However, where the student argues in favor of inclusion of a point in the record against the clinician's judgment, the issue should certainly be presented to the client, if close.[18] Regardless of general pronouncements that appellate counsel should reduce the number of claims raised as a convenience to the appellate courts, adop-

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[16] ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 21-3.2(B)(i) provides, in pertinent part:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence.

Id.

[17] *Jones*, 463 U.S. at 754. The *Jones* majority rejected the position advanced in the ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 21-3.2. Justice Brennan offered a strongly worded dissent, observing:

> The Court subtly but unmistakably adopts a different conception of the defense lawyer's role-he need do nothing beyond what the State, not his client, considers most important. In many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system. I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime. Clients, if they wish, are capable of making informed judgments about which issues to appeal, and when they exercise that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court.

Id. at 755, 764 (Brennan, J., dissenting).

[18] In *Smith*, 528 U.S. at 278 n.10, the Court observed: "[A]n indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments."

tion of this approach in the clinical setting may serve to undermine both the client's legitimate expectations for aggressive representation[19] and the student's interest in litigating aggressively.

The clinician's expertise is particularly important in ensuring not only that potential issues be properly identified and evaluated, but that alternative theories supporting the argument be considered. This is particularly important in two respects. First, the argument should be framed to provide alternative grounds for relief predicated on both federal and state constitutional authority supporting theories for relief when appropriate.[20] For example, Mississippi courts have consistently upheld the right of the criminal defendant to address the jury personally in closing argument, even when represented by counsel.[21] This right is specifically grounded in the language of the state constitution which provides "[i]n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both."[22] A comparable express right is not found in the Fifth or Sixth Amendments to the United States Constitution and a state court appellant relying on the federal constitution as support for a claim based on

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[19] *See* Commentary to ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 21-3.2. COUNSEL ON APPEAL:

> Counsel has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. Counsel's role, however, is to advise. The decision is made by the client. 'A defense lawyer in a criminal case has the duty to advise his client fully . . . as to the prospects of success on appeal, but it is for the client to decide . . . whether an appeal should be taken.'

Id.

[20] Mississippi, for instance, recognizes reliance on state constitutional protections as an alternative basis for relief. *See, e.g.,* Cannaday v. State, 455 So. 2d 713, 721-22 (Miss. 1984) (recognizing that Mississippi constitution includes same protections as the Fifth and Sixth Amendments for state court defendants demonstrating "an adequate and equal basis" for relief on state constitutional grounds); Orick v. State, 105 So. 465, 466 (Miss. 1925) (relying on United States Supreme Court reasoning in holding that Mississippi constitution afforded similar protections to state court defendants).

[21] *See, e.g.,* Armstead v. State, 716 So. 2d 576, 580 (Miss. 1998).

[22] MISS. CONST. art. 3 § 26.

denial of the right would likely lose either in the state courts or on certiorari to the United States Supreme Court.[23]

Second, the brief presented to state appellate courts should include federalized claims when possible to permit the client to present federal constitutional arguments to the United States Supreme Court by petition for writ of certiorari or through the federal habeas corpus process once the litigant has exhausted the state court process.[24] Even though a specific federal constitutional provision may not be advanced by trial counsel as the basis for objection, appellate counsel should cite supporting federal constitutional grounds because an appellate court's ruling on the merits of the federal constitutional claim will preserve the claim for later review in the federal system.

For instance, in *Cannaday v. State*,[25] the state supreme court noted that the precise constitutional claim had not been made by trial counsel in his repeated objections to improper argument alluding to the defendant's statement taken in violation of her Fifth and Sixth Amendment rights to remain silent and to assistance of counsel.[26] Nevertheless, the court

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[23] The Supreme Court could exercise its certiorari jurisdiction to consider a state court's reliance of Federal Constitutional protections in ruling for the defendant in such a situation, eventually reversing the state court if it concluded that the Federal Constitution does not protect an accused's right to address the jury personally. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (Court exercises its right to review state court decisions purportedly relying on Federal Constitutional provisions to ensure uniform construction of federal law, presuming that state courts rely on Federal Constitution unless clearly articulating an adequate and independent ground for decision under state law).

[24] 28 U.S.C. § 2254 permits state court defendants to seek relief in federal court from violations of rights protected by federal law occurring in their state criminal trials. 28 U.S.C. § 2254 (2000).

[25] 455 So. 2d 713 (Miss. 1984).

[26] *Cannaday*, 455 So. 2d at 721-22. The court noted the State's argument that trial counsel had failed to preserve error:

> The error assigned on appeal is that this statement was elicited from Ms. Cannaday in violation of her U.S. constitutional rights under the Fifth and Sixth Amendments. The state argues that the Fifth and Sixth Amendment right objection was not made at trial, and therefore, it is procedurally barred and not before this Court.

Id. at 721.

concluded that the objections were sufficient to alert the trial court, observing: "[T]his Court is compelled to note that objection was repeatedly made by defense counsel although not based on the specific ground of the right to counsel."[27] The court then proceeded to consider the claim on the merits of both federal and state constitutional guarantees, concluding:

> Although counsel was not as articulate in his first objection of "prejudicial" or "inflammatory" as he might have been, the objection was made, and the repeated objections cannot be ignored where fundamental constitutional rights are involved. *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 246 (1964). The gravity of this statement is evidenced by the fact that on the motion for a new trial, Judge Griffin stated: "I think that part about the head is probably what brought the death sentence." In view of defense counsel's objection, we address this issue on its merits in this capital murder case.[28]

The *Cannaday* court then agreed with appellate counsel's theory of the violation, finding, however, that the error was harmless as to the defendant's conviction for capital murder, but also that the prejudice resulting from the inflammatory nature of her statement required reversal of the death sentence imposed.[29]

3. Developing a Theme to Support the Prejudice Argument

Students, due to their inexperience in litigation, may have difficulty in developing a theory of the case essential to demonstrating the requisite level of prejudice necessary to obtain a reversal on an erroneous ruling in the trial court. This is, in fact, a common problem for even experienced criminal practitioners when proceeding at trial against either overwhelming evidence or when relying on a defensive theory at trial to the exclusion of alternative explanations that could have been

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[27] *Id.*
[28] *Id.*
[29] *Id.* at 724.

advanced. On appeal, counsel must typically be able to demonstrate some degree of prejudice in order to obtain reversal on all claims other than structural error, for which prejudice is presumed. Even the most favorable standard of review for criminal defendants, the harmless error test of *Chapman v. California*[30] requiring reversal for constitutional error unless the error is found to be harmless beyond a reasonable doubt, requires some showing of probable prejudice for constitutional trial errors.[31] Non-constitutional error is typically governed by a standard requiring the appellant to demonstrate some degree of prejudice in order to secure reversal.[32]

An example of the use of the trial record to demonstrate probable prejudice is presented in *Hickson v. State*.[33] The defendant, charged with sexual battery, prospectively challenged admission of his prior conviction for a similar offense by motion in limine.[34] The state supreme court granted certiorari to review the court of appeals' holding that the claimed error had not been preserved.[35] The trial court had noted the probable admissibility of the prior conviction, stressing on the record that the prosecution might want to use it for purposes of impeachment.[36] The supreme court concluded that the trial court had failed to conduct the necessary probative value/prejudice balancing test prior to ruling essentially that the prior convic-

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[30] 386 U.S. 18 (1967).

[31] *Chapman*, 386 U.S. at 24. See *supra* note 20 for a discussion of constitutional trial error based on the Supreme Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991), *overruling Payne v. Arkansas*, 356 U.S. 560 (1958), where the Court held that prejudice requiring reversal of the conviction would be presumed from the admission of a coerced confession against the accused at trial. In *Fulminante*, the Court held that claims of constitutional error committed during the course of trial that could be evaluated in terms of prejudice by looking at the entire trial record would be governed by *Chapman*, not requiring reversal if the error is harmless beyond a reasonable doubt in light of the whole record. *Fulminante*, 499 U.S. at 308-09.

[32] *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

[33] 697 So. 2d 391 (Miss. 1997).

[34] *Hickson*, 697 So. 2d at 393.

[35] *Id.*

[36] *Id.* at 396.

tion would be admissible for impeachment.[37] Hickson argued that the prospect of its admission chilled his exercise of his right to testify in his own defense.[38]

The supreme court explained that the trial court's failure to conduct the proper test in determining admissibility of Hickson's prior conviction had, in fact, abused its discretion: "The judge's ruling that evidence of the prior conviction could be admitted had a chilling effect on Hickson's testifying, and he did not testify."[39] The court then explained why the error required reversal, rejecting the intermediate court's claim that Hickson had failed to support his claim with an offer of proof. It concluded:

> Hickson entered a plea of not guilty to the offense. He presented three alibi witnesses that he was in Memphis, Tennessee, at the time of the alleged acts. As counsel points out, common sense and logic tell you that Hickson's testimony would mirror that of his alibi witnesses.
>
> Hickson's testimony was obviously critical to his defense, both as to his alibi defense and because he was the only witness that could address issues surrounding the purported fingerprint from a public video store introduced by the State. An on the record proffer would not have added one iota to the record already before the Court. Pet. for Cert. at 8-9.
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> Counsel would appear to be correct, and this factor distinguishes this case from *Saucier* [562 So. 2d 1238 (Miss. 1990)]. Additionally, pursuant to the many cases cited above,

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[37] *Id.* at 396-97.

[38] *Id.* at 397. Mississippi law requires the trial court's weighing of the probative value and potential prejudice in admission of evidence otherwise subject to exclusion appear on the record:

> Procedurally, the balancing requirements of [Evidence Rule] 609(a)(1) require a court to make an on-the-record finding of admissibility. Johnson v. State, 529 So. 2d 577, 587 (Miss. 1988); *Peterson,* 518 So. 2d [632,] 638. Our case law requires the trial judge to make an on-the-record ruling on admissibility prior to admission of evidence from the witness of a prior conviction. *McInnis,* 527 So. 2d [84,] 87 [Miss. 1988]; *Peterson,* 518 So. 2d at 636.

Id.

[39] *Id.*

> because the judge did not make an on the record analysis of the *Peterson* factors, or any analysis at all concerning his denial of Hickson's motion in limine, this error requires that the case be reversed and remanded for a new trial.[40]

The court's explanation demonstrates the thrust of the prejudice argument, that the trial court's ruling effectively deprived the appellant of the critical evidence that might have convinced the jury of his lack of culpability or raised a reasonable doubt.[41] Because his was the only testimony that could not only support his alibi, but explain the fingerprint evidence, the trial court's abuse of discretion in preemptively indicating its position that his prior conviction would be admissible to impeach his trial testimony effectively deprived him of evidence critical to his defense.[42]

In arguing the case for reversal, a showing of actual or probable prejudice may be required, but will always be valuable if it is grounded in common sense and logic and supported by the record evidence. The clinician's experience in developing a theory of the case that supports a claim of prejudice attributable to trial court error will prove essential in many instances. The clinical student learns this part of the appellate craft by having to address prejudice in analyzing the claims urged in the appellate brief and developing the argument supporting the claims.

4. Reviewing the Applicable Law

The clinical instructor or supervising attorney plays an additional role of extreme importance in ensuring effective representation for clinic clients. While clinic students may be adept at legal research and finding the applicable law governing the outcome of a case, the experience of the clinician may be particularly important when the law is unsettled, even though it may appear that the legal issue has been resolved.

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[40] *Id.*
[41] *Id.*
[42] *Id.*

An example arises in the context of the proper application of the ex post facto prohibition enumerated in the Constitution.[43] The constitutional prohibition is designed to prevent unfair retroactive application of law in criminal cases. In *Calder v. Bull*,[44] the Court recognized four categories of ex post facto violations, including, briefly: new laws criminalizing conduct not criminal at the time of its commission; changes in law that retroactively increase punishment over that available on the date of the offense; changes in law denying the defendant a defense available on the date of the offense; and changes in law reducing the prosecution's burden of proof from that required to prove the offense on the date of its commission.[45]

However, in the 1925 case of *Beazell v. Ohio*,[46] the Court's opinion did not include any reference to the fourth category of ex post facto violation. The three remaining categories were subsequently identified as constituting the parameters of the protection in *Collins v. Youngblood*.[47] In neither case was the fourth category expressly overruled. Nevertheless, any practitioner or clinical student lawyer might have concluded that *Collins* was controlling with respect to the parameters of the

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[43] U.S. CONST. art. I, § 10, cl. 1. Of course, the experienced clinician will also be aware of the possibility that comparable state constitutional provisions may also be available to afford relief. *See, e.g.*, Hill v. State, 659 So. 2d 547, 551 (Miss. 1994) (deciding case based on Mississippi constitutional ex post facto prohibition in Art. III, § 16 of state constitution).

[44] 3 U.S. (3 Dall.) 386, 390 (1798).

[45] *Calder*, 3 U.S. (3 Call.) at 390-91.

[46] 269 U.S. 167, 169-70 (1925).

[47] 497 U.S. 37, 52 (1990). The *Collins* majority discussed the fourth category in addressing the holding in *Calder v. Bull, id.* at 42, but omitted it from its conclusion:

> The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the Ex Post Facto Clause of Article I, Section 10.

Id. at 52.

protection afforded by the Ex Post Facto Clause.[48]

Some state rules relating to the quality of evidence necessary for conviction suggest the significance of the fourth category. For instance, in many jurisdictions, the testimony of an accomplice is not sufficient for conviction unless corroborated by independent evidence linking the accused to commission of the crime.[49] A second rule of evidentiary sufficiency applicable in Mississippi prosecutions involves the degree of proof required to sustain a conviction based entirely on circumstantial evidence. In such cases, a minority of jurisdictions require the State to offer evidence sufficient to not only establish all elements of the offense beyond a reasonable doubt, but also establish guilt "to the exclusion of every reasonable hypothesis other than that of guilt."[50] In *Stringfellow v. State*, the Mississippi Supreme Court noted that this rule had been discarded in other jurisdictions, while rejecting the State's appeal that the court similarly abandon its application in Mississippi prosecutions.[51]

The ex post facto question is presented when a jurisdiction does abandon a rule of evidentiary sufficiency, applying a more lenient rule retroactively to cases pending prior to the change in law. This was precisely the issue before the United States

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[48] U.S. CONST. art. I, § 10, cl. 1.

[49] *E.g.*, ARK. CODE ANN. § 16-89-111(e)(1)(A) (2005) (requiring corroboration of accomplice testimony to support conviction for felony or juvenile offense; corroboration must tend to connect defendant to offense and not simply show that the offense was committed or the circumstances under which it was committed); TEX. CRIM. PROC. CODE ANN. art. 38.14 (Vernon 2000) (requiring accomplice testimony corroboration). Under Mississippi law, the testimony of an accomplice is viewed with suspicion, but may be adequate to support conviction even if uncorroborated unless it is unreasonable, improbable, self-contradictory, of impeached. Jones v. State, 368 So. 2d 1265, 1267 (Miss. 1979). However, a cautionary instruction regarding the reliability of accomplice testimony is required if the prosecution relies on uncorroborated accomplice testimony inculpating the defendant. Strahan v. State, 729 So. 2d 800, 805 (Miss. 1998); *accord* Mangum v. State, 762 So. 2d 337, 342 (Miss. 2000) (affirming conviction where jury instructed on reliability of accomplice testimony by viewing testimony "with great suspicion and distrust" because on slight corroboration required to sustain conviction).

[50] Stringfellow v. State, 595 So. 2d 1320, 1322 (Miss. 1992).

[51] *Id.*

Supreme Court in *Murphy v. Kentucky*,[52] in which the defendants were convicted on uncorroborated accomplice testimony although at the time of the offense state law required corroboration of this type of evidence in order to sustain conviction.[53] In dissenting from the denial of certiorari on the claimed ex post facto violation, Justice White noted a split in jurisdictions previously reaching this issue in arguing, consistent with his traditional view, that the Court should resolve the split.[54]

The unresolved question presented for practitioners in light of *Collins* is whether a change in state law relating to abolition of accomplice corroboration or heightened scrutiny of circumstantial evidence implicates ex post facto prohibitions. It is not unlikely that many lawyers would have concluded that relief would not be forthcoming on such claims following *Collins*. But a thoughtful criminal appellate lawyer, the type of lawyer ideally supervising criminal appellate clinical students, would have been sufficiently familiar with *Calder, Beazell* and *Collins* to realize that the Court had never formally rejected the fourth category of ex post facto protections.

In fact, in the Court's 2000 decision in *Carmell v. Texas*,[55] the fourth category was explicitly discussed by both the majority[56] and dissent[57] in the review of a change in Texas statuto-

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[52] 465 U.S. 1072 (1984) (White, J., joined by Brennan, J. and Powell, J., dissenting from denial of certiorari).

[53] *Murphy*, 465 U.S. at 1072-73.

[54] Justice White observed in concluding his opinion respecting the denial of certiorari:

> Because of the evident confusion among lower courts concerning the application of the *Ex Post Facto* Clause to changes in rules of evidence and procedure-and because some 15 other states have accomplice-corroboration requirements that they may choose to abolish, see App. to Pet. for Cert. in No. 83-5352, p. 15—we disregard our duty when certiorari is denied. Respectfully, I dissent.

Id. at 1073. On Justice White's attitude toward the Court's duty to resolve splits in constitutional interpretation, see J. Thomas Sullivan, *Justice White's Principled Passion for Consistency*, 4 J. APP. PRAC. & PROCESS 79 (2002).

[55] 529 U.S. 513 (2000).

[56] *Carmell*, 529 U.S. at 521-34.

[57] *Id.* at 553 (Ginsburg, J., dissenting). Justice Ginsburg's dissent characterized the change in law as one involving only a matter of evidentiary admissibility

ry law permitting conviction for a sexual assault offense without the former requirement of "outcry" on the part of the complainant.[58] The majority held that the legislative abolition of the outcry requirement constituted an ex post facto application of law where the defendant was tried for an offense allegedly committed before the date of the legislative change in the law, but after the effective date of repeal of the outcry provision. Because there was no "outcry" corroboration of the complainant's testimony, Carmell successfully argued that his conviction rested on insufficient evidence.

Finally, one other consideration would be particularly significant in determining whether a departure from traditional rules of evidentiary sufficiency violates the protection afforded by the Ex Post Facto Clause. That is, whether any change in the law is the result of legislative, rather than judicial action. In *Rogers v. Tennessee*,[59] a 5-4 majority of the Court held that judicial abrogation of the common law "year and a day rule" prohibiting a homicide prosecution where death did not occur within a year and a day following the commission of the act causing death[60] did not implicate ex post facto principles because the Clause itself is restricted to legislative action.[61] The majority further rejected the argument that retroactive application of the state court's ruling violated due process under the Fourteenth Amendment.[62] Instead, the majority distinguished legislative action from judicial retroactivity in reaching its conclusion that the constitutional limitations on the former do not necessarily apply to the latter.[63]

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that traditionally had been held not to implicate ex post facto protections in *Hopt v. Utah*, 110 U.S. 574, 589-90 (1884) and *Thompson v. Missouri*, 171 U.S. 380, 380-82, 386-88 (1898). *Id.* at 570-71.

[58] TEX. CRIM. PROC. CODE ANN. art 38.07 (Vernon 2000) (amended in 1993).

[59] 532 U.S. 451 (2001).

[60] *Rogers*, 532 U.S. at 453.

[61] *Id.* at 455. The majority noted that although the petition presented his claims in terms of a Fourteenth Amendment due process violation, he predicated much of his argument on the protections afforded by the ex post facto prohibition. *Id.*

[62] "We have observed, however, that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process." *Id.* at 456.

[63] *Id.* at 460-62. Justice Scalia, in dissent, disputed the majority's conclusion

Thus, not only would a change in either the accomplice witness or circumstantial evidence rules raise the question of constitutional retroactive application again revisiting the close decisions in *Carmell* and *Collins*, but also the distinction splitting the Court in *Rogers*. Evaluation of a retroactivity claim implicating these difficult issues requires that the clinician have not only a broad understanding of criminal law in order to advise students within the clinical setting, but also sufficient depth to articulate proper application of precedent in evaluating likely success of issues that might be urged on appeal. With regard to the example of changes in standards of proof, the narrow majorities in controlling United States Supreme Court decisions indicate the potential significance of these issues not only in the direct appeal from conviction, but for further review in state courts of last resort or in the Supreme Court.

5. Reserving Rebuttal Argument to Cure Defects

Oral argument remains a significant step in the appellate process in many appeals.[64] Of particular concern to counsel is

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on this point. *Id.* at 467, 469 (Scalia, J., dissenting, joined by Justices, Stevens and Thomas and by Breyer in part). Justice Stevens filed a separate dissent, as well. *Id.* at 467 (Stevens, J., dissenting).

[64] Oral argument is no longer considered a matter of right in many jurisdictions. For example, the Mississippi rule governing oral argument provides, in pertinent part:

> (a) When Allowed. Oral argument will be had in all death penalty cases. In all other cases, oral argument will be allowed unless the court, or the panel to which the case is assigned, unanimously agrees that:
> (1) the appeal is frivolous; or
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

MISS. R. APP. P. 34(a).

The rules also require that parties specifically request oral argument or notify the court of their intention to waive argument. MISS. R. APP. P. 34(b). The rule requires the party requesting oral argument to explain in their brief (Appellee's principal brief or Appellant's reply brief) or by separate letter why oral argument will "be helpful to the court." *Id.* The court also retains discretion to order oral argument even if not requested by either of the parties. *Id.*

that oral argument is often most important because questioning from the bench may lead to admissions that will result in the appeal being lost, rather than the reverse—that the oral argument will provide an opportunity to win the appeal. For instance, the Supreme Court expressly noted in *Dretke v. Haley*:[65]

> Petitioner here conceded at oral argument that respondent has a viable and "significant" ineffective assistance of counsel claim. Tr. of Oral Arg. 18 ("[W]e agree at this point there is a very significant argument of ineffective assistance of counsel"); see also *id.*, at 7 (agreeing "not [to] raise any procedural impediment" to consideration of the merits of respondent's ineffective assistance claim on remand).[66]

Here, counsel's admission was deemed sufficiently significant to be noted in the Court's opinion. In the context of clinical representation, the concern is that the student attorney is unlikely to be prepared to respond to a question from the bench that might evoke a dispositive concession or an admission warranted neither by the factual record or controlling caselaw.

Experienced attorneys may use oral argument to clarify the client's position on appeal or resolve a troubling dispute over the contents of the record. Oral argument affords the only opportunity in the typical appeal to address the appellate court in circumstances permitting counsel to determine whether a particular point is understood by the judges themselves.

The clinician should consider reserving the option of addressing the court during oral argument to provide backup to the far less experienced student advocate. This may involve reserving rebuttal or requesting that the panel permit counsel to split the argument.[67] For clinicians, splitting oral argu-

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[65] 541 U.S. 386 (2004).

[66] *Dretke*, 541 U.S. at 394 (alteration in original).

[67] Of course, clinical representation in the direct appeal process almost necessarily dictates that the caseload will primarily include appeals in which the clinic represents appellants, with the occasional prosecution appeal a possibility. Therefore the clinic will likely have the opportunity to open the argument and close with rebuttal. *See, e.g.*, MISS. R. APP. P. 34(e).

ment—when permitted by the court—provides an opportunity to ensure that the inexperience of the student will not result in the case being compromised. The clinic may well lose the case, but active participation of the clinician during oral argument may prevent a loss that results from an unfortunate answer offered in response to an unanticipated question from the bench or the student's confusion over a critical point of law.

C. Dangers Inherent in Accepting Failure as a Legitimate Education Tool

The role of a lawyer involved in clinical legal education is often complicated by the competing interests of the educational process and the goal of providing effective representation for the clinic's clients.[68] The education of the clinical law student may be furthered in some situations by permitting the student to complete the representation of the client without intervention by the clinic director or supervising attorney, even when the student's lack of knowledge, experience, or expertise may result in failure.[69] In maintaining a "hands-off" policy,[70] the

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[68] *See Reflection-in-Action*, *supra* note 13, at 67. In their study of clinical teaching methods based on a survey of younger clinical faculty, Justine A. Dunlap and Peter A. Joy discuss the demands of clinical teaching that often prove most difficult for lawyers engaged in clinical education. They note:

> [N]ew clinicians should realize that teaching students in a clinic is different from supervising other lawyers or even law students in a legal practice. The experience of supervision in practice settings and the skills involved in such supervision may be helpful to understanding clinical pedagogy, but clinical teaching requires an emphasis on helping students develop their ability to learn from experience. Rather than telling a clinic student what to do, clinical methodology calls for asking the student what he or she thinks needs to be done and why.
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> Next, the clinician discusses the student's plan for accomplishing the work, reviews and critiques the student's work when it is complete, and then discusses what the student believes to be the next steps. Many new clinicians were surprised by the demands of clinical teaching and the fact that the experience of supervising law clerks or other lawyers does not transfer wholesale to clinical teaching.

Id. They also note the particular response of one clinician surveyed who had practiced before undertaking clinical teaching: "This is nothing like handling your own cases and having student interns." *Id.* at 67 n.60.

[69] *See id.* at 89 n.148. A number of experienced clinical teachers have pre-

clinician makes a calculated decision that the adverse consequences can be so pedagogically valuable in exposing students to the reality of failure as an experience that must be addressed in real-world practice that compromising the client's interests are justified.[71]

This approach seems particularly naïve in the context of appellate representation for a number of important reasons. Perhaps most significant is the fact that accepting avoidable failure may influence the student's perception of the clinician as mentor and role model, leading to acceptance of failure in litigation as an acceptable norm.[72] Of course, virtually all trial and appellate lawyers suffer failure as a consequence of taking cases; undoubtedly, few enter into representation without some consideration of the potential consequences of failure. In fact, the *failure option* is often the most important consideration for

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viously discussed the role of ethical conduct in clinical representation. *See generally* Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473 (2004); Naomi R. Cahn, *Critical Theories and Legal Ethics: Inconsistent Stories*, 81 GEO. L.J. 2475 (1993); George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415 (1991); Peter A. Joy, *The Ethics of Law School Clinic Students as Student Lawyers*, 45 S. TEX. L. REV. 815 (2004); Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35 (2003); Peter A. Joy & Robert E. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493 (2002); James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 FORDHAM L. REV. 2377 (1999).

[70] *See Reflection-in-Action*, *supra* note 13, at 62. Respondents in the Dunlap/Joy survey noted that the seventh most difficult aspect of clinical teaching is "[k]nowing how much or when to intervene." *Id.* Perhaps somewhat telling, earlier data from 2001 indicated that clinical teachers considered the ninth most difficult aspect of clinical teaching being "[s]taying out of the way." *Id.* at 63.

[71] *Id.* at 87-91. Clinicians discuss the issue of intervention by the supervising attorney in terms of the *directive* and *non-directive* approaches. *Id.* at 84-90. The latter approach emphasizes the value of learning through failure, although clinicians deny that non-intervention can be justified if it will result in irreparable injury to the client's interests. *Id.* at 88-89.

[72] Moliterno, *supra* note 69, at 2387-89. Professor Moliterno argues that acceptance of failure sends the message that the interests of the lawyer, reflected in the clinician's interest in the educational goals of the clinic rather than in the success of representation, can be deemed more valuable than the client's interests. *Id.*

lawyer and client in discussing alternative courses of action. In some instances, counsel and client will proceed in an action virtually certain that the outcome will be unsuccessful, but the process of raising and litigating an issue or defense is important enough for a day in court.

For clinical law education purposes, discussion of potential outcomes and possible failures should be included in the discussions concerning alternatives available to the client. But this is far different from accepting failure as a consequence of trial error—including student lawyer error—that can be avoided by intervention by a seasoned supervising attorney.[73] In fact, clinicians should consider the criminal defendant's constitutional right to effective assistance on appeal as the paramount concern for clinical representation. The right of effective counsel cannot be ethically compromised for educational purposes, regardless of the otherwise appealing logic that learning is often advanced by the experience of failure.[74]

III. CONCLUSION

The criminal appellate litigation clinic offers the law school and law students a unique educational opportunity. The institution is able to afford criminal appellate clinic students an unparalleled instructional experience in the way actual cases are litigated. The learning experience is not exclusively confined to the processes by which counsel actually pursues the appeal on behalf of the client—reviewing the record, formulating a theme or combination of themes for the brief, researching the law, drafting the legal argument—but also includes an intensive review of the criminal trial process. For students, the appellate litigation clinic is an exercise in which substantive concepts, procedural rules, trial tactics, and evidentiary considerations are integrated in a single case. The clinical student,

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[73] *See* J. Thomas Sullivan, *Teaching Appellate Advocacy in an Appellate Clinical Law Program*, 22 SETON HALL L. REV. 1277, 1304-06 (1992) (advocating duty of clinical instructor or supervising attorney to intervene to protect client's interests on appeal).

[74] *Id.*

like the practitioner, deals with law in the context of the litigation process, rather than in the abstract discussion that often characterizes traditional classroom instruction.

For the institution, the criminal appellate clinic also serves additional important purposes. The institution, through the clinic, becomes actively involved in the organic process of development of the law through litigation in the jurisdiction's appellate courts. Through the clinician and student representation, the institution also makes valuable contributions to professional and public service in providing representation to clients, whose cases require skilled representation, and to the broader interests of improving the quality of appellate practice in the jurisdiction.

CONFESSIONS OF AN ASSISTANT PUBLIC DEFENDER TURNED CRIMINAL APPEALS CLINIC PROFESSOR

Howard K. Blumberg[*]

I. INTRODUCTION

On April 1, 1979, I began my career as an assistant public defender in the Appellate Division of the Miami-Dade County Public Defender's Office.[1] My experience in criminal appeals originated in the Appellate Division of the Miami-Dade County State Attorney's Office, where I was employed as an intern while attending law school at the University of Miami and briefly thereafter as an assistant state attorney. I worked in the Appellate Division of the State Attorney's Office from September 1976, until I joined the Public Defender's Office.

On April 1, 2004, I celebrated my twenty-fifth anniversary as an assistant public defender in the Appellate Division of what is now formally known as the Law Offices of Public Defender Bennett H. Brummer.[2] Over the course of those twen-

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[1] The Florida Legislature initially authorized a public defender system in Florida by chapter 63-409, Laws of Florida (1963), in response to the landmark United States Supreme Court decision in *Gideon v. Wainwright*, 372 U.S. 333 (1963). Graham v. State, 372 So. 2d 1363, 1365 n.2 (Fla. 1979). "From a staff of 16 attorneys in 1971, the Miami-Dade Public Defender's Office has expanded into the largest criminal defense law firm in the state of Florida." Miami-Dade Public Defender, Office History, *available at* http://www.pdmiami.com/history.htm (last visited Oct. 23, 2005).

[2] Bennett H. Brummer joined the Dade County Public Defender's Office as an assistant public defender in 1971. Miami-Dade Public Defender, Bennett H. Brummer, Biography, *available at* http://www.pdmiami.com/biography.htm (last

ty-five years, I have litigated hundreds of criminal appeals, with approximately five hundred reported decisions. I practiced primarily in the Third District Court of Appeal of Florida, which has jurisdiction over all appeals from the circuit courts in Miami-Dade County and Monroe County.[3] I also practiced in the Appellate Division of the Eleventh Judicial Circuit of Florida and handled a number of cases before the Florida Supreme Court.

Working as an appellate assistant public defender was an incredibly rewarding experience over those twenty-five years. However, as time wore on, the inevitable repetition in the innumerable transcripts I read began to take its toll. At times, I felt I would lose my sanity if I had to read another prosecution opening statement comparing that phase of the trial to a road map, a movie preview, or the cover of a jigsaw puzzle box. I began wondering if I could force myself to read yet another jury selection transcript in which the judge greeted the prospective jurors by telling them that the courtroom thermostat had only two settings: Ethiopia and Antarctica.[4]

On a more serious note, the combination of my many years of experience handling criminal appeals and the increased availability and sophistication of computer technology led to a growing temptation to revert to what I call "Appellate Auto-Pilot." I now had the ability to cut and paste relevant facts from transcripts on computer; relevant legal principles from legal research databases; and, in many cases, the argument itself from my personal database of briefs I had written over the years. Naturally, I always updated these arguments with the most recent case law. Nevertheless, the process still

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visited Oct. 23, 2005). Mr. Brummer was first elected as Dade County Public Defender in 1976, and he has been re-elected every four years since that date. *Id.*

[3] FLA. STAT. § 35.04 (2004).

[4] In a conversation with this judge a few years ago, I politely asked him to get some new material for the sake of the appellate attorneys who were forced to read the transcripts of his trials. The judge laughed and promised that he would do so. Alas, I very recently had occasion to review a transcript of a jury trial before this judge, and he greeted the prospective jurors in that trial with the same joke.

had an increasing tendency to become one which involved more rote and less reflection. Something was needed to reinvigorate both myself and the process of litigating criminal appeals.

That "something" presented itself in March 2004, a few weeks prior to my twenty-fifth anniversary as an appellate assistant public defender. I was approached by a colleague who asked if I would be interested in directing an Appellate Litigation Clinic at St. Thomas University Law School in Miami Gardens, Florida.[5] Unbeknownst to me, the new dean of the law school, Bob Butterworth, and my boss, Public Defender Bennett H. Brummer, had been discussing the formation of such a clinic for some time. Both Dean Butterworth and Mr. Brummer were eager to establish such a clinic in which third-year law students could work on real cases from the Public Defender's Office.

A few weeks after I was initially approached, I met with three representatives from St. Thomas University Law School: Professor Alfredo Garcia, Associate Dean of Academic Affairs; Assistant Professor Cece Dykas, Director of Clinical Programs; and Professor Amy D. Ronner. Assistant Public Defender Rory Stein, the Director of Training at the Public Defender's Office and a long-time adjunct law professor at St. Thomas, was also present at the meeting. During this meeting, everyone seemed to agree I would be a good choice to head the Appellate Litigation Clinic. We then turned to a discussion concerning how the clinic would operate.

I advised the St. Thomas officials that I intended to keep my position as a full-time assistant public defender, and therefore would not be able to maintain a presence on the law school campus during working hours. The school officials pondered this for a while and then responded that the problem could be overcome easily by operating the clinic as an externship at the Public Defender's Office, rather than an "in-house clinic." I sagely nodded my head in approval of this idea and jotted down a note to myself to look up the definition of

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[5] The St. Thomas University School of Law was founded in 1984.

the terms "in-house clinic" and "externship" as soon as possible. Everyone then agreed to start the Appellate Litigation Clinic as a one-semester, four-credit course in the spring of 2005. I subsequently met with Mr. Brummer and advised him about the details of the proposed clinic to be run, in large part, out of his office. He enthusiastically endorsed the planned clinic and graciously offered his full support of my efforts to set up the clinic within the Public Defender's Office.

In this article, I will recount my experiences of launching my Appellate Litigation Clinic at the St. Thomas University Law School and teaching the clinic during the spring semester of 2005. Also, I will discuss my plans for the future operation of the clinic, beginning in the fall semester of 2005.

II. (RE)STARTING THE APPELLATE LITIGATION CLINIC

Fortunately, I was not writing on a blank slate as I began to set up the Appellate Litigation Clinic at St. Thomas. Professor Amy D. Ronner started an in-house Appellate Litigation Clinic at St. Thomas in 1992.[6] That clinic operated under the direction of Professor Ronner until it was discontinued in 1999.[7] Appellate cases were transferred to the clinic from the Appellate Division of the Public Defender's Office. The transferred cases were selected from pending appeals in which the record had been filed and the defendant's brief was due. Professor Ronner's in-house clinic typically retained ten to fourteen third-year law students enrolled for two semesters. Under the student practice rules, the Florida Supreme Court certifies these students as legal interns, which allows them to

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[6] For an account of how the clinic began, see Amy D. Ronner, *Real Students, Real Appeals, Real Courts: The In-House Appellate Litigation Clinic at St. Thomas University School of Law*, II THE RECORD: J. APPELLATE PRAC. & ADVOC. SEC. FLA. B. 13 (1994).

[7] In an essay demonstrating how an in-house appellate clinic "synthesizes theory and practice while it trains students in appellate advocacy and professional responsibility," Professor Ronner describes her in-house appellate clinic and relates a number of her experiences in that clinic. Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 868 (1996).

appear in any Florida court.[8] Working under the supervision of Professor Ronner, and with the consent of their clients,[9] students wrote the briefs and argued the cases before the appellate court.

The clinic was a huge success, due in no small part to the phenomenal job done by Professor Ronner in directing the clinic. I have fond recollections of helping Professor Ronner select appropriate cases from my office and arriving at the lawyer's lounge of the Third District Court of Appeal to find a group of eager law students gathered around Professor Ronner as they prepared to argue one of the clinic's cases.

As I was planning to operate the Appellate Litigation Clinic as an externship at the Public Defender's Office, the clinic needed to be designed differently than Professor Ronner's "in-house clinic" at St. Thomas. In my clinic, each student would be required to be present at the Public Defender's Office at least sixteen hours a week. I would be the only attorney supervising the students. In addition, there would be a classroom component consisting of a two-hour class which I would teach one night each week. Due to these features of my clinic, particularly the numerous hours to be spent by the students in the Public Defender's Office under my supervision, it was determined that only four students would be chosen for the spring 2005 clinic. The four students would work on the appeals in two-person teams.

Another significant difference for the spring 2005 clinic was that the course would cover only one semester.[10] The students' first week in the Public Defender's Office was scheduled to begin on Monday, January 10, 2005, and the final week would end on Friday, April 29, 2005. To maximize the students' appellate experience in that four-month period, I

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[8] FLA. BAR. R. 11-1.2(b) ("An eligible law student may appear in any court or before any administrative tribunal in this state on behalf of any indigent person . . . .").

[9] Rule 11-1.2(b) requires that a client indicate in writing the approval of a student's appearance on the client's behalf.

[10] Starting with the fall 2005 clinic, students will enroll in the Appellate Litigation Clinic for two semesters.

decided to have the students assigned to what are known as "state appeals."[11] Such appeals are typically by the State from trial court rulings granting a defendant's motion to dismiss, motion to suppress, or motion to discharge based on a violation of the Florida Speedy Trial Rule.[12]

I believed that assigning state appeals to the students would have a number of advantages. To begin with, these types of appeals usually involve discrete legal issues, such as the Fourth Amendment search and seizure issues involved in a state appeal from a trial court order granting a motion to suppress. Procedurally, such appeals would give the students the best chance of writing a brief and participating in an oral argument before the end of the semester. I searched for two cases in which the record on appeal had been filed and the State had filed the initial brief of appellant. This would minimize any delays caused by the State moving for extensions of time. I anticipated that the students would have the answer brief ready to be filed in early March, two months after the clinic began. The oral argument would then most likely be scheduled sometime in late April.[13]

Assigning state appeals to the students in the clinic did present one potential problem. The Third District Court of Appeal grants only ten minutes per side in the majority of the cases which it schedules for oral argument. While counsel for the appellant can divide this time between the initial presentation and rebuttal, counsel for the appellee has only a single ten-minute period to present argument. As state appeals tend to involve a single issue, it seemed likely that only one member of each two-student team would be able to actually present the oral argument. Although I recognized this potential problem as soon as I decided to assign state appeals to the students, I was unsure how to resolve the problem. This was the

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[11] *See* FLA. R. APP. P. 9.140(c)(1) (setting forth the orders which the State may appeal in criminal cases).

[12] FLA. R. CRIM. P. 3.191 (establishing the legal rules for "speedy trials").

[13] The Third District Court of Appeal routinely grants all requests for oral argument, and the oral argument date is usually set upon the filing of the answer brief of appellee.

first of many problems in which I had no initial answer, but hoped to resolve over the course of the semester. Fortunately, I was able to determine satisfactory solutions for most of the problems which arose as a result of my lack of teaching experience. However, as detailed later in this article, my inability to find a completely satisfactory solution to the oral argument problem proved to be the major negative in my first experience as a clinical teacher.

To find cases to assign to the students, I gathered together approximately ten state appeals pending in the Appellate Division in which the record on appeal had been filed and the State had filed the initial brief of appellant. I reviewed the files in those appeals and found two promising candidates. Both cases were appeals by the State of Florida from a trial court order granting the defendant's motion to suppress. In both cases, the entire record on appeal was approximately one hundred pages, including the transcript of the hearing on the motion to suppress. Both cases involved interesting Fourth Amendment search and seizure issues. After reviewing and evaluating my cases for a few days, I selected two for the Spring 2005 Appellate Litigation Clinic.

III. EDUCATING PROFESSOR BLUMBERG

Needless to say, the classroom component of my clinic presented a daunting challenge to a fifty-something lifelong criminal appellate lawyer with no teaching experience. Over the years, I had supervised many new lawyers in the Appellate Division of the Public Defender's Office and this experience gave me confidence in my ability to supervise the clinical students as they wrote the brief and prepared for the oral argument. However, standing up in front of a group of students, no matter how small was another matter, not to mention such unfamiliar subjects as preparing a syllabus, developing a lesson plan for each scheduled class, and grading. I had approximately seven months between the time I was hired and the start of the clinic, however, I was unsure where to start my preparation for my "second career" as a teacher.

Happily, the answer to this question arrived quickly.

Shortly after I was hired, the clinical director at St. Thomas offered to send me to the Association of American Law Schools Workshop for New Law Teachers and New Clinical Teachers held on June 24-27, 2004, in Washington, D.C. At these workshops, I came into contact with numerous wonderful people who had been teaching law for many years in both clinical and non-clinical settings. I was exposed to vast amounts of information and I tried to absorb as much as possible. One piece of information which I repeatedly received made a particular impression. I was continuously told by speakers from the podium and in one-on-one discussions that I would love being a teacher; this information proved to be absolutely correct.

At the Washington, D.C. conference, I began to experience what I referred to as my "identity crisis" concerning the nature of the Appellate Litigation Clinic I was to be directing. My clinic was certainly not an "in-house clinic," as it would not be operated at the law school under the direction of a full-time law professor. However, my clinic did not fit within the structure of a typical externship, where students are usually sent to large public interest law firms to work under the supervision of lawyers in the firm who do not teach the students in a classroom setting. My proposed format differed significantly from this arrangement, as I was to be the sole supervisor of the students when they worked in my office and I was also to be their instructor in the classroom setting. At the conference, I asked many clinical instructors to describe the nature of their clinics to me and not one described a clinic quite like the one I was to direct. Needless to say, I found this experience fairly disconcerting. In meetings over the next few months with clinicians from the various South Florida law schools, I did not encounter anyone involved in a clinic similar to the Appellate Litigation Clinic I was designing. As the starting date for the clinic drew near, I realized that if my "identity crisis" was going to be resolved, the resolution would have to come from the actual operation of the clinic.

IV. The Birth of a Clinic

On September 30, 2004, the director of the clinical programs at St. Thomas sent each law student a list of the clinical opportunities available for spring 2005. Number eight on the list, sandwiched between the long-running in-house Bankruptcy Clinic and the new Elder Law Externship,[14] was the Appellate Litigation Clinic. Nine third-year students applied for the four positions in my clinic. I received the applications in late October and reviewed them to determine the four best candidates.[15] Among the various factors I considered were academic performance, moot court experience, completion of courses related to criminal law and appellate practice, participation in internships in criminal or appellate courts, and internships in law firms specializing in criminal or appellate practice.

On November 1, 2004, I selected the four students for my first Appellate Litigation Clinic. In mid-November, I met with the four students for the first time and gave them a brief description of how I planned to run the clinic. I immediately confessed to the students my total lack of teaching experience, and told them of my sincere hope that my extensive experience handling criminal appeals would compensate for this deficiency.

In the approximately six-week period between my first meeting with the students and the start of the clinic, I developed my syllabus, including a list of topics to be covered in each classroom session and a work schedule for the two student teams. In the syllabus, I tried to impress upon the students the serious nature of their responsibilities in the clinic arising from their representation of real clients in real cases pending in the appellate court. I warned them that due to the differences between the two cases chosen for the clinic, there could be considerable differences with respect to the workloads for the two teams. Furthermore, I cautioned the students that

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[14] This positioning did not bode well for my clinical "identity crisis."

[15] St. Thomas officials allowed me to select the four best students for my first clinic.

deadlines for team assignments were rigid and inflexible because we were required to abide by the deadlines set by the appellate court. After briefly discussing the subject of grading, I reminded the students that the Appellate Litigation Clinic was to be graded and not simply pass/fail. Finally, I let the students know that I reserved the right to edit the final briefs submitted by the students, as I was the person ultimately responsible for the representation of the clients.

An interesting phenomenon occurred as I worked on my own appeals during the weeks leading up to the commencement of the clinic. Naturally, the clinic was constantly on my mind during these weeks. As a result of this preoccupation with the clinic, my "Appellate Auto-Pilot" disengaged itself as I worked on my cases. The process which previously had sometimes drifted toward one involving more rote and less reflection, was reversing itself. At each stage of a case, I was taking a mental recalculation and analyzing what I was doing in preparation for explaining that stage to the students.

For example, as I prepared for an oral argument during this time period, I examined the process of reducing the arguments in my brief and the arguments in the State's brief to their essential components, determining the critical points of contention between the two sides, and determining the best ways to convince the appellate court in ten minutes to resolve those points of contention in my favor. Of course, this is what I always did as I prepared for an oral argument. However, I generally did these things automatically without thinking about the actual process in which I was engaged. Focusing and reflecting on my actual thought processes so that I could be prepared to explain them to the students was very rewarding. This experience was repeated many times, and at the various stages of the appeals that I was working: reading the trial transcripts and analyzing the proceedings to determine potential appellate issues, researching those potential issues, deciding which issues to raise in the brief, writing the statement of the case and facts in the brief, and writing the argument portion of the brief.

While it had once seemed as if the start of my teaching

career would never actually arrive, the last few weeks sped by and on Monday, January 10, 2005, my four students arrived at the Public Defender's Office. After taking care of the necessary administrative tasks, such as office identification cards, computer user names and passwords, etc., I had the students immediately begin work on their cases. As the briefs were to be filed in less than two months, I had little choice in this matter. I randomly paired the students into two-person teams and assigned each team one of the state appeals I had chosen for the clinic.

Due to the nature of the students' first assignment, I did not immediately give the students a copy of the initial brief of appellant filed by the State in each case. The first assignment, due at the end of the first week, was a first draft of the statement of the case and facts for the answer brief of appellee, based solely on the record on appeal. The purpose of this assignment was to have the students present the essential facts of the case without knowing the significance of those facts in light of the arguments presented by the State in its initial brief. I felt this exercise would dramatically demonstrate to the students the difference between presenting the facts as a neutral observer and presenting the facts as an advocate. The assignment for the following week was a first draft of the statement of the case and facts for the answer brief of appellee, based on the record and the State's brief. The students worked individually on the first assignments, so that I could assess each student's performance before the students started to work together in their two-person teams.

With the students established in my office and working on their first assignment, one of the major struggles of the clinic began. This struggle was finding the proper supervisory balance between actually showing the students how to write a particular portion of a brief and letting the students continue to struggle on their own to find the best way to write that portion of the brief. With the first two assignments, I got off easy. As I wanted to gauge the abilities of each student, and as the filing date for the brief loomed seemingly far off in the distance, I told the students they were totally on their own for

the first two assignments. While I assured the students that I would always be available to answer questions and help them with their work as the semester proceeded, I told them to give me their best individual efforts on the first two assignments.

On Thursday, January 13, 2005, somewhere around 5:00 p.m., I entered classroom four at the St. Thomas University Law School to teach my first class. Scattered throughout a large classroom which seated over one hundred students, were the four students enrolled in the Appellate Litigation Clinic. I took my place at the rostrum in the front of the classroom. I began the class, as I began each subsequent class, discussing with the students interesting events related to my caseload which had taken place in the week preceding the class. In the first class, I discussed with the students an oral argument I had presented to the Third District Court of Appeal on the day before the class.

I spent the remainder of my first class giving a prepared lecture on the Florida Rules of Appellate Procedure. I broke down the appellate litigation process into four general categories: Technical (the actual skills needed to litigate an appeal); Creative (using those skills to effectively advocate the position of the client); Ethical (representing the client zealously but within the bounds of the law); and Practical (corresponding with clients, dealing with the clerk's office at both the trial and appellate level, etc.). I then went through the appellate rules trying to relate each rule to the four categories I had created and also trying to tell the students stories from my actual experience in the context of a specific appellate rule. For example, in discussing the appellate rule governing the record on appeal,[16] I explained to the students what documents actually make up a record on appeal and the pleadings an appellate attorney must file to make sure that a complete record on appeal is prepared and filed (Technical); how including or excluding certain documents could have a substantial effect on winning or losing the appeal (Creative); an appellate attorney's responsibility to provide the appellate court with all

[16] FLA. R. APP. P. 9.200.

documents from the lower court relevant to a particular issue, even those documents which do not support your position on that issue (Ethical); and maintaining a close relationship with the trial and appellate court clerks to ensure that the record on appeal is properly filed (Practical). I then told the students about one of my appeals in which I made extensive efforts to locate a particular document and to ensure that the document was included in the record on appeal. The document ended up being the key factor in my winning that appeal.

While I felt that I had devised an effective and relatively entertaining way to cover the necessary but dry subject of the appellate rules, I must confess that my first class fell short of being a rousing success. At times it seemed as if I was just droning on and on and I could not tell if the students were absorbing any of the information I was giving them. One student simply stared at me the whole time, while another student spent the entire session typing away on his laptop computer. Granted, a lecture on the appellate rules is not likely to foster a lively exchange between teacher and student. Yet, after anticipating this first classroom session for so long, I walked out of the room at the end of class relatively uninspired. Fortunately, this was to change very quickly.

V. THE BRIEFS

Before relating my experiences over the next weeks as the students worked on the briefs, a short description of the two cases assigned to the students is in order. In the first case (hereinafter "The Unlawful Detention"), the trial judge had ruled that the defendant was legitimately stopped for a traffic citation but that the detention of the defendant should have ended once the citation was issued because the officer had no reasonable suspicion that a crime had been committed to justify further detention. Accordingly, the judge granted the defense motion to suppress the evidence obtained by the police as the result of that unlawful detention.

The issues in the second case (hereinafter "The Warrantless Search"), were considerably more complex. The trial judge in that case had suppressed a gun on both Fourth and Fifth

Amendment grounds. The judge first ruled that the arresting officer was required to advise the defendant of his Miranda[17] rights prior to questioning him concerning the details of a shooting and the location of a gun inside the defendant's house because the defendant was in custody for Miranda purposes at the time of the questioning. The court further ruled that the subsequent warrantless entry into the house to search for the gun violated the Fourth Amendment because there were no exigent circumstances and the defendant had not voluntarily consented to the entry and search of his home. Finally, the court ruled that the inevitable discovery doctrine[18] did not apply to allow for the admission of the illegally obtained evidence.

On the day before the second class, the students handed in their second assignment, the revised draft statement of the case and facts, based on the record and the arguments presented in the State's brief. In the second class we discussed the first two assignments in conjunction with my prepared lecture on "Effective Brief Writing Part One: The Statement of the Case and Facts." The nature of the briefs filed by the State greatly enhanced the effectiveness of the first two student assignments and also enhanced the interest level of the students during the second class.

In "The Unlawful Detention," the State had filed a very weak brief. The State's first argument in the brief was that the defendant lacked standing; the second argument was that the suppressed evidence was admissible under the inevitable discovery doctrine. Neither of these arguments had been made by the State in the lower court. In the last few pages of the brief, the State generally addressed the ground on which the trial court had granted the motion to suppress. The students assigned to "The Unlawful Detention" were mystified by the State's brief. Obviously, their first version of the statement of the case and facts had not addressed anything related to

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[17] Miranda v. Arizona, 384 U.S. 436 (1966).

[18] *See* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a) (4th ed. 2004).

standing or the inevitable discovery doctrine. The students wondered how the State could devote the majority of its brief to two issues not addressed in the lower court and discuss the issue litigated in the trial court as almost an afterthought.

The State's brief in "The Warrantless Search" had a number of similarly inexplicable aspects. The brief focused exclusively on the Fifth Amendment violations and basically ignored the Fourth Amendment issues. The State's brief did not directly address the warrantless entry of the house to retrieve the gun nor seek to justify that entry on grounds of consent or exigent circumstances.

At the outset of the second class, I had the students on each team describe their case to the other team. This exercise served to both familiarize each team with the nature of the other team's case and give the students an early opportunity to orally present the case in a concise manner. I then discussed with the students how their statement of the case and facts had changed based on their review of the State's brief. For the remainder of the class, I discussed with the students how they must craft their statement of the case and facts to tell the story of what happened in the case in an interesting fashion and also present the facts in a manner which would persuade the appellate court to uphold the trial judge's ruling and reject the arguments presented by the State in its brief. I integrated the draft briefs submitted by the students into this discussion, along with examples from briefs I had written. I fired questions at the students and they fired questions back at me. The students seemed to be totally engaged in the exercise and the time flew by quickly. After this class I understood what people were talking about when they said I would "love teaching."

As the students arrived at my office during the following week, I began my individual editing sessions with them. I had lengthy discussions with each student concerning the drafts they had previously submitted to me. I was now fully engaged in the supervision dilemma that was to be ever-present until the briefs were filed. I did my best to point out the things that needed to be corrected, to explain why they needed to be cor-

rected, and to give the students a general idea about how the corrections should be made. I repeatedly resisted the temptation to simply make the corrections myself and then explain to the students why I had made the corrections.

In the next two classroom sessions, we discussed the students' first and second individual drafts of the entire answer brief. I reviewed some basic principles of legal research with the students and gave them examples of how those principles could be employed to research the issues in their cases. I explained the importance of organizing the legal arguments to be presented in the brief. I described the process as: (1) listing the arguments presented by the State in the initial brief; (2) formulating the response to each of those arguments; (3) developing the arguments that needed to be presented independently of the arguments raised by the State; and (4) synthesizing these elements into a coherent whole which would convince the appellate court to affirm the lower court orders granting the motion to suppress. I continued to cite examples from both the students' cases and my own cases to demonstrate the points I was trying to make. Once again, this process seemed to fully engage the students and made for a lively and rewarding classroom experience for both myself and the students.

Just as everything seemed to be coming together nicely, the dreaded concept of grading reared its ugly head. In planning the clinic, I had decided to grade the final draft of each student's individual answer brief and the final draft of each team's answer brief. The final drafts of the individual briefs were due to be filed on the day before the fifth classroom session. Having never taught before, I struggled mightily in grading the final drafts of the individual briefs. As I was not teaching a substantive course on criminal law or constitutional law, I did not feel it was proper to grade the students on their mastery of the legal principles involved in their cases. As I was not teaching a course on legal writing, I did not feel it was proper to grade the students on how well their briefs were written.

After many hours of thought, I finally decided to base the

students' grade on: (1) the level of effort spent in the preparation of the brief; (2) how well the students had responded to the lessons in brief writing which I had tried to impart during the classroom sessions; and (3) how well the students had responded to the lessons in brief writing which I had tried to impart during the individual editing sessions. My task was made somewhat easier by the fact that all four students had worked very hard during the first four weeks of the clinic. Although the quality level of the four individual briefs submitted to me varied substantially, it was clear that each of the students had been listening in the classroom sessions and the individual editing sessions, and had tried their best to integrate what they had learned into the writing of those briefs. The progression from the first draft brief submitted by the students to the final draft of the individual brief was truly remarkable. In advising the students of their grades on the brief, I gave each student a brief explanation of what I thought they had done well and what I thought needed improvement. The students seemed to greatly appreciate this feedback.

Following the submission of the final drafts of the individual briefs, the students began work on the team briefs to be filed in the appellate court. At the beginning of the next class, I emphasized the fact that the liberty of two real people was at stake in their cases. Both clients had been released from custody on their own recognizance pending the State's appeal. In my experience, most clients think the case is over when the trial judge grants their motion to suppress, even though they are told that the State has filed an appeal and that if the suppression order is reversed they will again have to face the charges. The motions to suppress were most likely going to be dispositive of each case, and thus if the suppression orders were affirmed on appeal, the cases would be over and the clients could get on with their lives. However, if the suppression orders were reversed, the prosecution of each client would resume and they would be subject to substantial jail sentences if they were convicted. After weeks of actually working on the cases, this discussion seemed to have a very sobering effect on

the students.

In the classes leading up to the filing of the final team briefs, I moved more and more from a discussion of general principles of effective brief writing to more specific principles applicable to the students' cases. As I discussed a particular problem related to a section of the brief in one of the cases, I always tried to show how the solution to that problem could be used in the other case as well. For example, in both cases the State had presented arguments to the appellate court which had not been presented to the lower court. The students tended to focus on the merits of these arguments rather than the legal principles which barred the State from raising the issues for the first time on appeal. I told the students to thoroughly research these legal principles, paying particular attention to cases in which a particular argument raised by the State in their case had been rejected by an appellate court because it had never been presented to the lower court.[19]

Also, both teams had to find the proper balance between addressing the merits of the claim and the lack of preservation of that claim. Should the students not address the merits at all and simply point out that the arguments had not been presented to the trial court and cite the cases which establish that the arguments had been waived? Should they briefly mention that the issues were made for the first time on appeal and then address the merits in depth? These were of course decisions which I had made hundreds of times over the course of my career as an appellate assistant public defender. However, discussing these decisions with the students made me reexamine the process in-depth and gave me a greater appreciation for the nature of the work I had been doing for so many years.

As the deadline for filing the brief rapidly approached, the individual editing sessions with the students in my office

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[19] *See e.g.*, State v. Mae, 706 So. 2d 350 (Fla. Dist. Ct. App. 1998) (refusing to consider the State's standing argument in an appeal from an order granting a motion to suppress because no such argument was ever presented to the trial court).

lengthened and intensified. The temptation to actually write a critical portion of a brief myself became almost irresistible due to the time constraints involved and because, by this time, the students had been given multiple opportunities to "get it right." After all, in the final analysis, the interests of the clients had to take precedence over the education of the students. Fortunately, because I was blessed with excellent students who worked incredibly hard on the briefs, in most instances, the students eventually were able to write those critical portions of the brief by themselves based on my criticisms and suggestions.

The final drafts of the team briefs were submitted to me on February 23, 2005. I graded the briefs and did some minor technical editing, and on March 11, the briefs were filed in the Third District Court of Appeal, along with requests for oral argument.[20] The students were all very excited when I presented the final versions of the briefs to them for their signatures as certified legal interns. On March 18, the Third District Court of Appeal scheduled oral argument in both student cases for April 26, two days before the last classroom session of the clinic.

VI. The Oral Argument (Heads I Lose, Tails Nobody Wins)

With the briefs filed, I began preparing the students for oral argument. For the next two weeks, the students attended oral arguments at the Third District Court of Appeal rather than report to my office. I had the students note the names of the three judges on each panel, the type of case being argued (criminal law, contract law, family law), the issues involved in the appeal, and their general impressions of the oral arguments. This proved to be a rewarding exercise for myself and

[20] Interestingly, the State had failed to file a request for oral argument along with its initial brief in both of the two student cases. Counsel for appellant's failure to file a request for oral argument, in a court such as the Third District where oral argument is routinely granted upon request, is generally viewed as a lack of confidence in the positions espoused in the initial brief.

the students. I was both educated and amused by hearing oral arguments described from the perspective of third-year law students. The students benefitted greatly from watching a number of oral arguments before they had to present the oral argument for their cases. Indeed, as I prepared the students for the oral argument in their cases, they frequently mentioned something they had seen in an oral argument which exemplified the point I was trying to make. I tracked the cases which the students had observed and at the beginning of every class, for the remainder of the semester, I discussed with the students any decisions which had been issued in those cases.

Of course, as we began our preparation for the oral argument, I was squarely faced with the problem I had anticipated concerning only one member of each team being able to actually present the oral argument in court. I had told the students about this potential problem in the first class, but the subject obviously needed to be readdressed at this point in the semester. I had quickly come to realize while editing the students' briefs that the issues could not effectively be divided for purposes of oral argument in either case. I therefore had to decide how I would select one person from each of the two teams to present the oral argument in court. Still unable to come up with a satisfactory solution, I told each student to prepare for the oral argument as if they were the student selected to actually present the argument in court. I told the students they would be notified at a future date as to how and when the actual selection would be made. I confess this was not a shining moment in my budding teaching career.

I began the classroom preparation for the oral argument by showing the students two interesting arguments which I had presented to the Third District Court of Appeal a few weeks before.[21] Although it was a somewhat humbling expe-

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[21] The chief clerk of the Third District Court of Appeal, Mary Cay Blanks, was kind enough to provide me with CD-ROM versions of my two oral arguments. I am deeply indebted to Ms. Blanks for all the assistance she gave me during the course of the spring 2005 semester.

rience to watch portions of these oral arguments over and over and critique my performance, I found it to be a great teaching tool. I stopped the playback at various points in the argument and discussed with the students the dynamics involved at that point. It was particularly educational and entertaining to stop the playback just after I was asked a question by the judge and ask the students how they would respond to the question[22] and then show them the answer I had given. We spent a full classroom session on each of my two oral arguments and those were two of the best classes of the semester.

Following these two classes, I conducted mock oral arguments during the classroom sessions. I recorded these arguments on audiotapes and reviewed them with the students individually in my office. For the first mock argument, I told the students to give me a five to seven minute presentation of their case. I told the students I would not interrupt their presentation with questions, as the purpose of this exercise was to test their ability to clearly and concisely present the essence of their case to the court. Each student was present in the classroom to watch the arguments presented by their fellow students. The four arguments were presented one after the other and at the conclusion of all the arguments we discussed the presentations.

In the next classroom sessions, we began full mock oral arguments with my questioning of the students during their presentations. I tried to ask slightly different questions of each team member during these exercises. I began with fairly simple questions and then progressed to more difficult ones over the course of the next several classes. During the students' time in my office following each mock oral argument, I went over the questions with the students and had them work on perfecting their answers to the questions.

One of the more entertaining experiences during these mock oral arguments occurred fairly early in the process. In

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[22] I provided the students with the briefs in each of the two cases before class so they would have the opportunity to familiarize themselves with the issues in the cases.

my weekly review of new decisions, which was a routine part of my work as an appellate defender, I noticed that two decisions had just been issued which directly related to issues in each of the two student cases. During the first mock oral arguments after I read those decisions, I asked each student to address the effect of the decisions on the arguments they had presented in their briefs. None of the students had any idea what I was talking about, and each student recovered from their flustered state with varying degrees of success.

At the end of the mock arguments, I handed out copies of the recent decisions to the students and explained the two main purposes of the exercise. First, I discussed with the students the proper way to respond to an appellate judge when asked to address a case with which they are unfamiliar. Second, I cautioned the students that appellate research does not end with filing the brief. A good appellate lawyer must check at least once a week after the brief is filed to find any new appellate decisions relevant to the issues in their pending appeals.

Approximately three weeks prior to the oral argument date, I began class with a frank discussion concerning the selection of the students to present oral argument to the court. I told the students that I had struggled long and hard with this dilemma and that I had finally decided to make the selection based on my evaluation of the students' performances during mock oral arguments before both a panel of three of my colleagues in the Appellate Division of the Public Defender's Office and the remaining mock arguments in the classroom. I explained to the students that in the final analysis, my overriding obligation was to provide the clients with the best possible representation in their appeals. Although I was not happy about making the process a competition between teammates, this seemed to be the best way to make the selection which would best serve the interests of the clients. The students, although certainly not happy with the prospect of working so hard to prepare for the oral argument and then not actually arguing the case in court, seemed to accept my decision as the best possible solution under the circumstances.

Approximately two weeks before the oral argument date, each student participated in a mock oral argument in my office before three experienced assistant public defenders in the Appellate Division. To make the argument as realistic as possible for the students and to provide some entertainment to my colleagues, I performed the role of the State in the mock arguments. As the appellant, I presented the opening argument and my colleagues showed me no mercy in their questioning. Although somewhat less confrontational when the students presented their arguments, my colleagues questioned the students vigorously. The students were confronted with questions which were more difficult than the questions I had asked in the classroom mock arguments. As it turned out, some of my colleagues' questions were more difficult than the questions the students received in the actual oral arguments. The students acquitted themselves well during the office mock arguments, but they were all somewhat rattled by the experience. I reassured each student afterwards, and spent time with each student going over the best answers to the questions they had faced. At the end of the entire process, they were much more confident of their ability to perform well at the actual oral argument.

However, the burning question remained: Which students would be chosen to argue the cases in court?[23] Following the mock arguments in my office, I advised the students I would make the final decision, after evaluating their performance in both mock oral arguments, in the last class prior to the actual oral argument date. In that class, each student would present their oral argument to me with the other three students out of the room. Each teammate would be given the same questions during the mock oral argument. After both teammates had presented their arguments, I would evaluate their perfor-

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[23] Interestingly, when I presented this dilemma to my mock judges when I took them to lunch to thank them for their help, they tried to ease my pain by suggesting that I flip a coin to make the decision. While such a solution was certainly "appealing," in that it would take me off the hook, I felt it would not be fair to either the students or my clients to make the decision in this manner.

mances and decide which student would argue that case in court.

All four students did very well in their arguments. I had no doubt that all four students were capable of making an excellent presentation to the appellate court. However, in each team, one of the two students had clearly performed better than the other, and I selected those two students to present the oral arguments in court. I called all four students back into the classroom to announce the decision, which was met with various reactions which need not be detailed here. Mercifully, the time at which the class ended arrived almost immediately after I announced the decision. The students filed out of the classroom and I experienced my lowest moment of the semester. All four students had worked incredibly hard on both the briefs and the preparation for the oral argument. All four students deserved the opportunity to argue the case in court. There was simply no way for me to give each one that opportunity.

Five days later, the students arrived at the Third District Court of Appeal to present the oral arguments in their cases. The cases were argued back to back and each case was argued before the same three-judge panel. It might have been my imagination, but there seemed to be a palpable feeling of happiness emanating from the bench as the judges watched the bright, eager law students take their place at counsel table and the grizzled old assistant public defender take his seat inconspicuously a short distance behind the students. The bench was very active during both oral arguments, peppering the students with both favorable and unfavorable questions. The students performed beautifully in both cases. I told the students before the arguments that they were on their own and I would not whisper suggestions or pass notes to them as they sat at counsel table and presented their arguments. I must admit that once or twice I was tempted to give the students some help, but I resisted the temptation. Before we knew it, both arguments were over. We walked out of the courthouse together, engaged in a post-argument analysis session on the courthouse steps and that was that.

VII. The End of the Beginning

Two days later, we had our final class. As I had done on the courthouse steps, I complimented the two students who argued the cases on their fine performances and I praised all four students for their excellent work over the course of the semester. I confessed to the students that although I had devised an overall plan for the clinic prior to the first class, I had in large part "made it up as I went along" throughout the course of the semester. The students all laughed at this, but they seemed to agree with me that most of my decisions turned out well. I sincerely thanked the students for making my first teaching experience such a rewarding one. I told them I hoped to direct the Appellate Litigation Clinic for many years, but that the four of them set the bar very high for future students and they would always occupy a special place as my first students. I wished them luck on their upcoming exams and in their future legal careers. I advised them that it was difficult to predict when the Third District Court of Appeal would issue the decisions in their cases. Based on my experience, I told them that the decisions could be issued as early as two weeks from the date of the oral argument, or as late as several months later.

On May 4, 2005, eight days after the oral argument, the Third District Court of Appeal issued its opinion in "The Unlawful Detention" case affirming the trial judge's suppression order.[24] I immediately sent news of the decision to the client, the students, the director of the clinical programs at St. Thomas, the dean of the law school, and Public Defender Bennett H. Brummer. One week later, the court issued its decision in "The Warrantless Search" case affirming the trial court's suppression order.[25] I quickly sent out similar notifications.

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[24] State v. Villate, 901 So. 2d 953 (Fla. Dist. Ct. App. 2005).

[25] State v. Iglus, 902 So. 2d 164 (Fla. Dist. Ct. App. 2005) (table).

VIII. The Future

The next Appellate Litigation Clinic will be an eight-credit course in fall 2005 and spring 2006. Once again, four third-year law students will be enrolled in the clinic. As the clinic will run for the entire school year, the students will have the opportunity to write initial briefs rather than answer briefs. I will devote substantial time to subjects such as assembling the record on appeal, analyzing the record to find potential appellate issues, and deciding which issues to raise in the initial brief. Needless to say, a top priority in the clinic will be giving each student the opportunity to argue their case in the appellate court. I hope to get two appeals through the entire appellate process, including oral arguments. If I am successful in this endeavor, each student will argue one case before the appellate court. Even if only one case reaches the oral argument stage before the end of the year, one teammate will present the opening argument and the other teammate will present the rebuttal.

Finally, I am happy to report that my "identity crisis" concerning the nature of my Appellate Litigation Clinic resolved itself over the course of the spring 2005 semester. Through the various experiences of the clinic in the classroom and in my office, the identity of my particular type of clinic became clear to me. Indeed, I must confess that I believe the model which evolved from my improvised solutions to the many problems I faced during my first teaching experience is a pretty good one, whatever it is called. Come to think about it, is it not true that clinics are supposed to be all about learning from experience?

THE EVOLUTION THROUGH EXPERIENCE OF CRIMINAL CLINICS: THE CRIMINAL APPEALS PROJECT AT THE UNIVERSITY OF WISCONSIN LAW SCHOOL'S REMINGTON CENTER

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This article describes the Criminal Appeals Project, one of the clinical programs at the Frank J. Remington Center at the University of Wisconsin Law School.[1] We first offer a brief

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[1] The University of Wisconsin Law School has a tradition of focusing its scholarship and teaching on the "law in action," the concept that in order to truly understand the law, one need not only know the "law on the books," but also how the law plays out in practice. The emphasis on the "law in action" led to early recognition that clinical programs are a crucial element of legal education. For a discussion of the school's history of supporting clinical legal education, see Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, WIS. INT'L L.J. (forthcoming 2006).

The Remington Center is the largest clinical program at the law school and represents one of the largest law school clinical programs in the country. The program is named after the late Frank J. Remington who was a distinguished professor at the University of Wisconsin Law School from 1949 until 1992. The Criminal Appeals Project is one of several clinical programs within the Remington Center. The other projects include: (1) Legal Assistance to Institutionalized Per-

overview of the project. We then give a short history and describe some of the missteps we have made along the way, and our efforts to correct them. We then set forth six core principles that have evolved over the years and explain how those principles are reflected in the design and implementation of the project. We hope that other law schools which currently have, or are contemplating creating a similar program will find it useful to learn about those aspects of the program that have been successful and avoid some of the missteps we have taken.

I. DESCRIPTION OF THE CRIMINAL APPEALS PROJECT

Each year, eighteen students at the University of Wisconsin Law School enroll in the Frank J. Remington Center's Criminal Appeals Project. The students commit to remain in the clinical program both for fall semester (four credits) and the ensuing spring semester (three credits). While in the program each student is teamed with a partner, and along with a clinical professor, they work on the direct appeals of two defendants recently convicted of criminal offenses.

Of the two clients represented by each team, one has been convicted pursuant to a guilty plea[2] and the other convicted

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sons Program (LAIP), the oldest (since 1963) and largest of the projects, which offers legal assistance to prison inmates throughout Wisconsin; (2) The Wisconsin Innocence Project, which investigates claims of actual innocence for inmates in Wisconsin and elsewhere; (3) The Family Law Project, which focuses on divorce, paternity, child support, and visitation issues for Wisconsin prisoners; (4) The Restorative Justice Project, in which students mediate victim-offender conferences in Wisconsin prisons; (5) The Economic Justice Institute, which has three components: Consumer Law Litigation Clinic, the Family Court Assistance Project and the Neighborhood Law Project. The Remington Center also includes two externship programs: The Public Defender Project, where law students intern during summer at various trial level public defender offices throughout Wisconsin; and the Prosecution Project, where law students intern during the summer at district attorney's offices throughout Wisconsin. The Law School also has a number of clinical opportunities in various programs that are not part of the Remington Center. *See* The University of Wisconsin Law School, *at* http://www.law.wisc.edu/clinics/clinicaleducationskillstraining.htm (last visited Feb. 3, 2006).

[2] "Guilty plea" cases include those in which the defendant entered a "no-con-

following a trial. All eighteen clients are appointed by the Wisconsin State Public Defender's Office, which pays the project the standard rate allowed for appointed counsel.[3] All of the clients are indigent, and have previously notified the trial court of their desire to pursue postconviction remedies. The cases are not prescreened except to ensure that half of the cases are guilty pleas and that none of the trials lasted more than one week.[4]

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test" or an *Alford* plea. *See* North Carolina v. Alford, 400 U.S. 25 (1970) (defining *Alford* plea as one where defendant pleads, without admitting, guilt in exchange for a lesser sentence).

[3] The Public Defender currently pays $40 per hour for attorney time (both in-court and out-of-court), and $25 per hour for travel. For students, the Public Defender pays $30 per hour. The Public Defender also pays expenses for such items as travel, copying, and expert witness fees (when approved by the agency in advance). It is interesting to note that the state legislature has denied repeated requests to increase the $40 per hour rate for attorneys, and the current rate has been in effect since 1994 when the project began. This has made it increasingly difficult to fund the project, where salaries have increased to reflect experience and inflation. Not surprisingly, the lack of increased funding has caused many to worry about the quality of representation throughout the state, since many attorneys have found that they can no longer afford to accept appointments.

This article does not discuss budgetary constraints, in part because of the difficulty in determining with any precision what the project costs. Most of the project staff also work in other Remington Center clinical programs. The Remington Center provides administrative support, secretarial support, housing, and other miscellaneous costs (telephones, computers, mailing, etc.) that can not be easily distinguished from costs of the project. It is easier to calculate the income from the Public Defender's office, which has averaged about $60,000 per year since we began accepting eighteen cases per year. As with virtually all clinical programs, the cost of the project exceeds its income. For a discussion of the relative costs of traditional and clinical legal education, see Margaret Martin Barry, et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2004).

[4] Others have written of the critical importance of carefully screening prospective cases. *See* Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 GONZ. L. REV. 1, 9-10 (1998). However, we believe that it is not worth the effort. Part of the reason for this is that we find meritorious issues in a relatively large portion of cases without pre-screening. Moreover, it would require enormous amounts of time to attempt to determine in advance which cases might harbor meritorious postconviction or appellate issues. Beyond reading the transcripts, there are few effective and reliable ways to screen cases. One possible method would be to contact the trial attorneys from prospective cases and ask their opin-

During their two semesters in the project, the students perform all the tasks that are necessary to represent criminal defendants in the appeal of their convictions: they meet with the clients, study transcripts and other court documents, identify and research issues, write postconviction motions, present evidence and argument at postconviction hearings in the trial court, and write briefs to the Wisconsin Court of Appeals.[5] Each student is closely supervised by clinical faculty, who meet at least once per week with each pair of students to monitor progress on the cases.

Once per week, throughout both semesters, the students attend a class designed to introduce them to general principles of appellate advocacy.[6] In addition, students and their supervising attorneys attend one "small group" session each week.

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ions as to whether viable issues exist. While asking opinions is necessary *after* a case has been assigned, it has limited value in selecting the cases. In our experience, the trial attorneys often fail to point out issues that turn out to be the primary issues for appeal. Not surprisingly, this is especially true in cases where there are claims of ineffective assistance of counsel—the single most commonly litigated claim used in the project. Conversely, trial attorneys sometimes point to issues that, in our opinion, do not have sufficient merit to raise on appeal.

[5] All persons convicted of crimes in Wisconsin have the right to appeal to the Wisconsin Court of Appeals. WIS. STAT. § 974.02 (2003). If the court of appeals denies the claim, defendants have the right to petition for review in the Wisconsin Supreme Court, which may accept or reject the case at its discretion. WIS. STAT. § 809.62 (2003). Because of the amount of time it takes to complete an appeal to the court of appeals, students are seldom involved in submitting a brief to the Wisconsin Supreme Court.

[6] In the fall semester, there are ten weekly large group class sessions, each lasting eighty minutes. The topics are, in order of presentation, as follows: (1) Introduction to Client-Centered Representation and Preparation for Client Visits; (2) The Importance of Facts on Appeal: "The Thin Blue Line;" (3) Obstacles to Appellate Success: the Record, Waiver, Standard of Review, and Harmless Error; (4) Brainstorming and Issue Spotting; (5) Theory of the Case and Postconviction Motions; (6) Ineffective Assistance of Counsel Claims; (7) Challenging a Sentence on Appeal; (8) The No-Merit Process; (9) Appellate Attorney/Client Relations: Who Decides What Issues to Raise on Appeal; (10) Persuasive Writing.

In the spring semester, there are large group class sessions on the following topics, some of which cover two class periods: (1) Storytelling, Theory and Theme; (2) Writing the Statement of Facts; (3) Writing Issue Statements and Point Headings; (4) Trial Advocacy Skills; (5) Conducting Ineffective Assistance of Counsel Hearings; (6) Writing the Argument Section of a Brief; (7) Using Persuasive Storytelling in Oral Argument.

Each small group is made up of six students and their supervising attorneys; hence, there are three different small groups. During the fall semester, the small groups meet to "brainstorm the facts for each of the six cases assigned to group members. In the spring semester, the small groups again meet weekly to offer suggestions and constructive criticism on drafts of briefs submitted by each student, and on mock oral arguments.

As can be expected, not every case is litigated. In some cases there are no issues of arguable merit, and the client either accepts that assessment or requests an *Anders*[7] (or "no-merit") brief, to be filed with the court of appeals. In other cases, there may be issues of arguable merit, but the client requests that no appeal be filed in order to avoid the risks of retrial or resentencing.

Litigation comes in two forms: postconviction motions to the trial court, and appeals to the court of appeals. In Wisconsin, before an appeal is taken to an appellate court, defendants have the right to file postconviction motions in the trial court to address issues that have not been previously raised.[8] This includes evidence relating to ineffective assistance of counsel claims; whether a plea was made in a knowing and voluntary manner; the introduction of newly discovered evidence; and many other possible claims.

A majority of the project's cases proceed to litigation. In part, this is due to Wisconsin's scheme of allowing postconviction claims to the trial court before the cases proceed to appellate courts. But there are at least two other reasons for the relatively high litigation rate. First, we place a

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[7] Anders v. California, 386 U.S. 738 (1967). During the four-year period from 2002 to 2005, only two no-merit briefs were filed out of seventy-two cases in the project. Generally, when we find insufficient merit to justify litigation, the client agrees without requesting that a no-merit brief be filed. These cases are not counted as "litigated cases" in the project's statistics because in such cases we are no longer operating as an advocate for the client.

[8] *See* WIS. STAT. § 809.30(2)(h) (2003). However, the trial court may deny the defendant's request for an evidentiary hearing when the defendant fails to allege facts which, if true, would entitle him to relief. *See* State v. Bentley, 548 N.W.2d 50 (Wis. 1996).

high emphasis on collaboration through which several students and attorneys are involved in each case,[9] making it less likely that issues will be missed. Second, we follow a client-centered model of representation which is attentive to clients' frequent desire to litigate their cases.[10]

Consequently, in the four years between 2002 and 2005, the project litigated twenty-four out of the thirty-six cases (67%) in which there was a trial, and eighteen out of the thirty-six cases (50%) in which there was a guilty plea.[11] The project has been successful in obtaining relief in many of these cases. In the same four years (2002 to 2005), clients obtained relief of some sort in 71% of those guilty plea cases litigated (34% of all assigned guilty plea cases) and 65% of those of trials litigated (38% of all assigned trial cases).[12]

Regardless of the outcome of the cases, the students gain a solid foundation in many of the areas considered important in legal education, including problem solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication, counseling, negotiation, litigation, and other skills that should serve them well in their future careers.[13]

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[9] *See infra* Section III (discussing the project's emphasis on collaboration).

[10] *Id.* (discussing also the project's use of client-centered representation).

[11] This appears to be a higher rate of litigation than attorneys employed by the State Public Defender, or private bar attorneys appointed by that office. Although statistics from the same time period were not available, that office reported that in 1997-99, their staff attorneys litigated (or filed a no-merit report) in 36% of all cases, and private bar attorneys litigated (or filed a no-merit report) in 53% of their cases.

[12] Cases were deemed "successful" in the following situations: (1) the clients' convictions were vacated, and the charges dismissed with prejudice (9% of successful cases); (2) the clients' convictions were vacated entitling the client to a new trial (64% of successful cases); (3) the clients' sentences were vacated, leading to the right to be resentenced (9% of successful cases); or (4) the clients' sentences were modified to a shorter term (18% of successful cases).

[13] These are all skills identified in the "MacCrate Report," named after Robert MacCrate, chairman of the task force that produced the report; its formal title is: AMERICAN BAR ASSOCIATION, SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MacCrate Report]. For a summary of the

II. Creation and Growth of the Criminal Appeals Project

In 1993, a clinical professor at the Remington Center[14] and the director of the State Public Defender's Appellate Office[15] together proposed the creation of the Criminal Appeals Project. Law school administrators approved of the project for a variety of reasons. First, the MacCrate Report, released in 1992, called for the development of clinical programs emphasizing skills and values, which the project's emphasis on the development of analytical and writing skills accomplished.[16] Second, the project fit within the existing structure of the Remington Center and could be housed in the same building. Third, the State Public Defender assured the project that a sufficient number of cases could be appointed at the appropriate times. Fourth, and finally, the project did not require full law school funding, since a portion of the budget could be supplied by income from the State Public Defender, which paid the standard rates for other appointed attorneys.

The project began in 1994. Twelve years later, some of the features of that early program survive, but many have been modified. The revisions came about through reflection by clinical faculty, feedback from students, and the infusions of new ideas from others. A brief description of the structure of the early program, and why modifications were deemed necessary, follows.

ABA reports, symposia, and scholarly articles directly responding to the MacCrate Report in the years following its publication, see Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 Clinical L. Rev. 109, 116-17 nn.33-37 (2001).

[14] The clinical professor was Katherine Kruse, who is now a law professor at the William S. Boyd School of Law at the University of Nevada, Las Vegas.

[15] Ken Casey, now a clinical professor at the University of Wisconsin, currently supervises students in the project.

[16] *See* MacCrate Report, *supra* note 13.

The First Two Years

In its first semester of operation, Spring 1994, ten students enrolled. Each student was assigned to work on one appeal under the supervision of a single Remington Center faculty member. All students were required to continue work in the project through the ensuing summer semester while they were enrolled in one of the Remington Center's other clinical programs, the Legal Assistance to Institutionalized Persons Program (LAIP).

As they worked on their cases, project students attended a weekly class designed to teach general principles of appellate advocacy. There were no structured opportunities for students to discuss their cases with other students or staff.

It soon became evident that there were a number of problems with the structure of the program. The lone supervising attorney had other clinical duties, leaving insufficient time to review all the transcripts from each of the cases while closely supervise the students. While some of the students performed well, others had difficulties performing many of the tasks that are necessary in representing clients—understanding the complex appellate procedure, spotting issues, analyzing and researching the law, and writing briefs. Some of the students had simple cases which were quickly resolved, leaving little to do for the rest of the year. Others were mired in huge cases with multiple issues, leaving them feeling overwhelmed.

Perhaps because of these problems, the project had trouble finding enough students in its second year of operation. Out of the ten spots available, only four students enrolled. Worse yet, two dropped out after the first semester leaving only two students to complete the course. It was obvious that changes had to be made to keep the program alive.

The First Wave of Modifications

Knowing that changes were necessary, the clinical faculty restructured the project. Given the difficulties of recruiting students, the project tapped into the already available well of

students who were enrolled in LAIP.[17] Through LAIP, students had experience visiting inmates in prisons and helping them solve various legal problems; consequently, it was not a difficult adjustment to work on an appeal.

Thus, we required each of the fifty LAIP students to take an appeal. Some of the students worked on a case without a partner; others were partnered with another law student. A total of thirty cases were assigned. The following year, even though LAIP students were no longer required to take an appeal, twenty-five students volunteered.

Seven different LAIP clinical staff supervised the cases. As before, all students took a weekly class in appellate procedure, but there were still few structured opportunities for students to collaborate with others.

By spreading the workload around to many supervisors, the modified design allowed closer supervision than was previously possible. However, there were decided disadvantages. First, none of the supervisors had significant experience working on appeals. Although the supervisors gradually gained experience with each passing year, the learning curve was somewhat slow since each attorney only had a small number of cases. Second, it was difficult for students and attorneys to balance the work on the cases with their regular LAIP work, causing them to prioritize some cases to the detriment of others. Third, and finally, the students still did not have a regular forum to discuss their cases with others besides their supervisors.

III. The Modern Project and the Development of Core Principles

In 1997, the clinical faculty addressed the above noted problems and redesigned the project. The hiring of an experienced attorney from the State Public Defender Appellate Office, who could provide new ideas and leadership, stimulated this effort. At that time, efforts were made to identify and ar-

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[17] *See supra* note 1 for more information on the LAIP program.

ticulate the core principles of the project. Eventually, six core principles emerged. The project was then redesigned to reflect those principles. The result was the formation of the modern project, which has remained mostly intact since 1998. The six core principles are:

1. The representation of clients should be of the highest quality possible.
2. Although closely supervised, the students should take primary responsibility for their cases.
3. Both the educational benefits of the program and the quality of the representation are enhanced when students work in a collaborative environment.
4. A client-centered approach to representation provides the best model to achieve maximum educational benefits and the highest quality of service.
5. The ability to use facts to tell a persuasive story, guided by a clear theory of the case, is crucial to effective appellate representation.
6. Students should be encouraged to reflect on their work and on the criminal justice system.

The following is a discussion of each core principles along with a description of how we attempted to infuse those principles into the program.

Core principle #1: The representation should be of the highest quality possible.

This core principle is probably assumed, but it needs to be made explicit because of constant pressures that, if left unchecked, can erode the basic commitment to quality representation. These pressures include the need to educate law students and the need to stay within reasonable budgetary constraints.

Our desire to teach law students to become excellent lawyers requires that we set high standards for the quality of work. But there are other compelling reasons. First, stakes are high for clients. Almost all have been sentenced to prison,

and many are serving long sentences.[18] It is imperative that the quality of representation not be sacrificed by the fact that students are involved in the case. Second, the development of new case law affects future clients and the administration of justice throughout the state. That case law is best developed when appellate attorneys, both for the prosecution and defense, are able to articulate cogent arguments defending their position, and identify and properly analyze public policy considerations that are raised in the cases.

There are many ways to ensure the highest possible quality representation, but we discuss two here: the decision to hire adequate numbers of staff who specialize in criminal appeals cases and the importance of recruiting and motivating students.

Staff Considerations

In order to ensure high quality representation it is important that supervising attorneys not be overburdened by having too many cases or students. Given past experiences in which many clinicians supervised cases we decided that a full time supervising attorney for the project should work on no more than twelve appeals at any given time. This is especially important because all eighteen cases are commenced at the same time, which often means that there are certain times of the year that are especially busy.[19]

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[18] Wisconsin does not have capital punishment, so the project does not have any death penalty cases. Also, since the project only takes cases in which the trial lasted one week or less, there are few first degree murder cases. However, most of the cases are felonies. In a typical year, out of the eighteen cases, there are usually several involving lesser degrees of homicide, sexual assault, armed robbery, burglary, and delivery of illegal drugs, with sentences ranging from probation to over 100 years.

[19] We request the cases from the State Public Defender's Office in mid-July of each year so that the transcripts are prepared by the first part of September, when the class begins. After the transcripts are received, we have sixty days to file a post-conviction motion or notice of appeal. *See* WIS. STAT. § 809.30(2)(h) (2003). Needless to say, the first few weeks of November are generally very busy. Beyond that the cases tend to spread out as each case begins its course through the system.

Even though the students are encouraged to take responsibility for their cases, the supervisors still have much to do to assure the quality of representation. They read the entire transcript and prepare their own digest. They rely to varying degrees on student research but they frequently conduct their own research (if for no other reason than to make sure that the students have not missed relevant authority). Of course, the supervisors heavily edit student briefs, a task which frequently takes more time than it would to simply write the brief without assistance.

Besides limiting the number of cases we also decided to limit the size of the cases we accept. We implemented a policy of not taking any trials lasting more than one week in length; most trials are between one and three days. This cut down on the workload and helped make the distribution of cases to students more even in terms of complexity.

In addition, we decided that half of the cases should be those in which the client pled guilty or no-contest.[20] Pleas produce fewer transcripts that must be studied. Pleas are also less likely to lead to litigation, and when they do, they involve a narrower range of issues.[21]

We also decided that the supervising attorneys should be clinical faculty without significant competing job responsibilities. We no longer have supervising attorneys from other clinics (such as LAIP) working on one or two cases. Instead, each of the supervising attorneys is an integral part of the project and becomes a specialist in criminal appeals. The current staff has four supervising attorneys. Two are half-time who supervise students on six appeals cases each (three trials

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[20] *See supra* note 2.

[21] However, guilty plea cases still can contain interesting issues that require research and investigation. In Wisconsin, a defendant can plead guilty but still preserve the right to appeal the trial court's denial of a motion to suppress evidence or a motion challenging the admissibility of a defendant's statement. WIS. STAT. § 971.31(10) (2003). In addition, guilty plea cases often have other viable issues, including: claims that the prosecutor violated the plea agreement; ineffective counsel; the plea was not made in a knowing and voluntary manner; or the sentence was illegally imposed.

and three guilty plea cases). The other two clinicians, who divide their time with the Remington Center's Innocence Project, are assigned to three cases per year. All four clinicians also help with teaching the classroom component and attend most, or all, of the weekly small group sessions.

With relatively low caseloads the supervising attorneys are able to immerse themselves into each case. The attorneys read and digest all of the transcripts and review all other court documents. The attorneys approve all student correspondence and other communication with the clients, prosecutors, judges, and others associated with the case. The attorneys meet in-person with the clients, although generally not at the beginning of the case. The attorneys carefully review all motions and briefs that are produced. Of course, the attorneys need to be careful not to "take over" the cases from the students by doing all of the work, or using students simply as law clerks. However, in the end, it is the attorneys who are ultimately responsible for making sure that the work on the cases is the highest possible quality.

Student Considerations

The project attempts to attract law students who are highly motivated. This is the most important quality affecting successful representation. In order to find those students we visit all first year criminal law classes. We describe the project and invite interested students to apply. The application consists of a resume and a one or two page statement of interest. This, along with word-of-mouth from former students, is generally sufficient to generate more applications than we have positions. We then make our selection based solely on reading the applications.[22] Since most of the applicants are first year students, we do not use grades in the selection process[23] or

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[22] *See* Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 185-86 (1996) (discussing student recruitment in clinicals).

[23] *See id.* at 210 (noting that although few clinics use grades in their recruitment, some require applicants to have a minimum grade point average to protect them from receiving poor grades in other courses under the increased work load

conduct personal interviews.[24] Instead, we look for those students who have taken the time and effort to write a thoughtful statement and those who have a variety of past experiences and backgrounds.[25]

There is good reason for the students to remain highly motivated once they begin work in the project. Most of this

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that the clinic will impose).

A number of students who have excelled in the project performed poorly in the first semester of law school, and might not have been admitted had grades been considered. By admitting these students they were given an opportunity to distinguish themselves in another area that may be more indicative of future success as an attorney. To evaluate whether law school grades predicted success, we obtained the first semester grade point averages of all fifty-six students who enrolled in the project during the past three years. We then compared these grades with the grades the same students received in both the fall and spring semesters of the project. The students who had the highest law school grade point averages generally performed above average in the project, and those who had the lowest grade point averages generally performed below average in the project. However the correlation was weak. Of the twenty-eight students with the highest (i.e. above average) law school grade point averages, eighteen received the highest grades in the project and ten received below average grades in the project. We also looked at what happened to students who had extremely low law school grades because these would most likely become the students who would be not accepted into the project if grades were considered. We found that when the students' law school grades were extremely low, these students usually ended up having the most trouble in the project. However, there were notable exceptions. In one case, the student with the second lowest grade point average turned out to earn the second highest grade in the project. While no one else did this well, many others at least performed at an average level.

[24] Although the Criminal Appeals project has never used personal interviews, the LAIP program did so in the past. At one point, LAIP conducted an informal study to determine whether personal interviews were predictive of obtaining the best students. Each applicant was interviewed after which the interviewer assigned a "grade" based on the interview and the application. This "grade" was then compared with evaluations of the same students by their supervisors after one year in the program. The results showed no correlation between the two scores so the program abandoned the process of individual interviews.

[25] In our small group meetings, students' experiences often shed light on some issue that comes up in a case, making it desirable to select students who have worked in various fields. Obviously, it is very helpful to have students with prior experiences in law enforcement, such as former police officers. However, it has also been helpful to have students with other experiences. For example, a student with experience as a convenience store clerk likely has knowledge that could be useful in representing a person convicted of robbing such a store. Similarly, experience as bartenders, taxi-cab drivers, social workers, nurses, medical doctors or a wide variety of other fields can be invaluable.

comes from the fact that it is the students who form the primary relationship with the clients by visiting them and contacting them about the case. The students are keenly aware that their clients rely on them to work diligently. Often, students find their clients both likeable and deserving of some sort of relief which further motivates them.

That is not to say that there are never problems with students. Some students lose motivation because of the client's personality or the nature of the crime. Others find it difficult to invest the necessary time due to outside commitments. These types of problems usually become quickly apparent and we try to correct the problem by talking to students about the importance of their duties to clients.

Grades are another possible way to motivate students, and we have experimented with different grading systems over the years: pass/fail, letter grades that do not affect students' overall class rankings, and number grades that do count into class rankings. None of these systems have proved completely satisfactory. Pass/fail grades reduce competitive pressures and assist the "collaborative effort" which we try to encourage between students. However, some students feel that a "pass" is insufficient to reflect the considerable work they have put in the project and worry that the program will be viewed by employers as something other than rigorous.

At the other extreme, number grades which are counted into class rankings have proved to be a motivating force for some,[26] and they allow instructors to differentiate more clearly between various levels of achievement. However, there are also clear drawbacks to this system. Student collaboration sometimes suffers; if a student is given a low grade he or she may become discouraged in the second semester and interest or motivation may suffer. Another problem in giving number

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[26] *See* Schrag, *supra* note 22, at 201-04 (discussing the use of grades in clinical program); *see also* Jan Stiglitz, et.al., *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413, 429 (2002) (discussing the fact that grades can motivate students to work harder but noting negative aspects as well).

grades is that it can be difficult to compare students' work: some cases are rich with legal issues, giving students ample opportunity to either excel or struggle; other cases are simpler and provide fewer opportunities to fairly evaluate their work.

For now at least, we have settled on a new grading option. We have decided to give four possible grades: S+, S, S-, and U. These grades will not count towards students' overall class rankings. Although it is possible that this might reduce one source of motivation, we hope the challenge and responsibility will otherwise be sufficient motivation.

Core principle #2: The students should, to the extent possible, take primary responsibility for the cases.

An important aspect of the project is that students take primary responsibility for their cases. Although it is easier to articulate this value than to put it into practice, it can never be forgotten that the students are not clerks in a law firm; rather, they are in a law school environment and it is critical that interactions with the students be designed to enhance their legal education. This is especially important at this stage of their development, before they face the real-world pressures of heavy caseloads, the demands of the adversarial system and need to make money, all of which can compromise the ability of attorneys to focus solely on a client's needs.

The educational experience of the students is enhanced by giving them primary responsibility for the case.[27] From the first day of class, the students are challenged to accept this responsibility. They are told that it is their job to stay in contact with their client, keep track of all deadlines, come fully prepared to meetings with their supervisors, and do whatever is necessary to provide the best representation for clients. In addition, the students are required to track and record their time so that the project can receive payment from the Public

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[27] *See* David F. Chavkin, *Am I My Client's Lawyer? Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1531-32 (1998) (concluding that students get the most educational benefit out of client representation where the student's autonomy is maximized).

Defender.[28]

Following the first week of class, the students visit both of their clients, who are usually at one of the prisons situated throughout the state. In past years, the supervisors accompanied the students during this first visit, but this caused problems. Commonly, the clients turned their chairs toward the "real" attorney, relegating the students to spectator status. Therefore, supervisors no longer accompany students on the first client visit.

As the cases progress the students continue to maintain a high level of involvement. Each student must read and digest all transcripts from their two cases. They come to meetings with their supervisors with ideas regarding issues and follow up with research memos discussing them. For both postconviction motions and appellate briefs, students write initial drafts and then make revisions suggested by supervisors and other students. If a hearing or oral argument is required the student may present the argument if appropriate.[29]

During weekly meetings, supervisors do not simply answer students' questions relating to case research or make the important decisions.[30] Rather, they motivate and challenge

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[28] While the Public Defender pays $30 per hour for student work on the cases, it should be noted that when the bill is submitted for payment the students time is usually reduced by the supervising attorney to more accurately reflect the value of the student work. For example, if the student spends time preparing a memo on an issue that the supervising attorney already knows well, it is not included in the bill.

[29] Under Wisconsin's Student Practice Rules, law students are authorized to appear in court with supervision when they have completed one-half of their law school credits. *See* Wisconsin Supreme Court Rules § 50.03. Second year students then must wait until the spring semester for this opportunity. Students frequently conduct post-conviction motion hearings that occur in the spring semester but only after the supervisor is satisfied that the student is fully prepared, and only after the client consents in writing. The Wisconsin Court of Appeals rarely grants oral argument so this is generally not available to students.

[30] The question sometimes arises as to whether students should be sent on research missions concerning issues in which the attorney is already well-versed and may already know the answer. From an educational angle there certainly is value in such an assignment. Indeed, if the supervisor is an expert on the topic, there is even more value because it creates the opportunity for more astute obser-

students to think about what they are doing and why they are doing it.

Every case requires decisions. Some belong to the client; such as whether to take the risk of proceeding with an appeal. But most decisions fall to the supervisor and the students: how to deal with clients at interviews and in correspondence, whether certain issues are frivolous, which issues should be primary, how to frame the theory of the case, and many more. We stress to the students that we are all on the same team, and that the students are not only welcome to give their opinions, but required to weigh in on important issues. After all, students have certain advantages over the supervisor in their ability to take more time with the transcripts and conducting the research on the law.

On the other hand, the supervisors are the attorneys-of-record, and ultimately, are duty-bound to make the final decisions as to some issues.[31] These decisions are usually consistent with the advice of the students, but there are times when they are not, requiring that the supervisor defend those decisions. At other times, there is no clear "best" decision, and either of two or more courses of action would be equally acceptable. In such instances, supervisors often allow the students to make those decisions. This not only relays to the students that they are an important part of the team but also that the law is full of ambiguities and shades of gray.

Clearly, the first two core principles (providing high quali-

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vations and feedback. Therefore, we generally do assign such research. However, there are times when we tell the student that research is not needed on a particular issue because the answer is well-known and that the student's time would be better spent on other issues.

[31] In a 1990 article, George Critchlow explores when and why the clinical teacher should intervene between student and client, and concludes that teachers must balance a variety of client-centered considerations which focus on client expectations, student competency, teacher competency, and the interest of the client and others in minimizing delay, financial costs, and emotional discomfort. George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene,* 26 GONZ. L. REV. 415 (1990); *see also* Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship,* 4 ANTIOCH L. J. 301 (1986) (arguing that as the student becomes more competent the amount of supervision should decrease).

ty representation and requiring students to take responsibility for the case) can collide. There are times when the best quality representation requires the attorney to emphasize service over education.[32] But such situations are rare and usually these principles complement one another. That is, the best representation occurs when the attorney provides steady and competent guidance to students who have fully accepted our invitation to take responsibility for the case.

Core Principle #3: Both the educational benefits of the program and the quality of the representation are enhanced when students work in a collaborative environment

Most successful appellate attorneys do not work in a vacuum. They may perform the bulk of the research and analysis for their cases but it is important that they have others with whom they can consult—to generate new ideas, provide a different perspective, or serve as devil's advocates. Having such colleagues is especially important when one is inexperienced, as are all of the students in the project.[33]

Therefore, the project is structured to provide students with plentiful opportunities for collaboration. By pairing students into teams, they work together on two appeals, one trial and one guilty plea. They are supervised by a different attorney for each case.

This structure has several advantages over the single student/single case model. First, it gives each member of the team the chance to learn from each other. Since more minds

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[32] Some clinicians resolve this question differently, finding that when the educational mission conflicts with the duty to provide quality representation to clients, the clinician must give priority to educational value, given the fact that the essential purpose of a law school clinic is to educate future lawyers. See Maureen E. Laflin, *supra* note 4, at 15-16 (1998).

[33] For an extensive discussion of the benefits of collaborative and cooperative learning, *see* Clifford S. Zimmerman, *"Thinking Beyond My Own Interpretation:" Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L. J. 957 (1999). For a more specific discussion of the pairing of students in clinical programs, *see* David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 CLIN. L. REV. 199 (1994).

are working on the case, it is more likely that meritorious issues will be spotted, and the litigation will be finer tuned. Second, it is unlikely that *both* of a team's cases team will have no merit. Since, historically, the project has litigated well over half of its cases, most teams will have at least one case that will proceed to litigation.[34] Third, this structure exposes students to more cases, issues, and supervising attorneys, thereby broadening their experience.

The project also encourages collaboration through the use of "small groups" that meet weekly with supervisors throughout both semesters. The small groups are made up of six students (three pairs of partners), and the supervisors of those students.[35] The focus of the meetings is always on the individual cases that come out of that group. At the beginning of the year, the groups "brainstorm" one case each week. The purpose is to think expansively to identify alternate ways to understand the facts and the story of the case.[36] Later in the year, the small groups provide feedback to students on their drafts of briefs and critique students' oral arguments.

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[34] Of course, sometimes both cases for a given team fizzle out quickly. When that happens, the project has done one of two things. First, the students can be moved to work on other cases currently in the project. This can prove to be very helpful when a team is working on a particularly complex case, and can use the additional assistance. Second, the supervising attorney can manipulate the facts of the case to create a hypothetical case that has merit. Although this solution does not change the outcome for the client, it does give the students a chance to still write a brief, albeit on made-up facts. Of these two solutions the first is preferable for obvious reasons.

[35] Usually, this means that there are three supervising attorneys attending each of the small group meetings. Obviously, this is a very low student-attorney ratio and it takes real restraint for the attorneys to not "take" over the discussion, but allow the students to express their thoughts. We have thought about reducing the number of attorneys in each small group for this reason but we have not done so because it is important that the attorneys be there when their own cases are being discussed, and they also inevitably bring good ideas to the discussion of other cases.

[36] In these sessions, one pair of students prepares and distributes to the others a memo on the facts of the case to be discussed. After a period of time when the group clarifies any factual questions the group throws out ideas ("brainstorms") about possible issues in the case, different ways to view the case, or lists things that they would like to know more about.

Core Principle #4: A client-centered approach to representation provides the best model to achieve maximum educational benefits and the highest quality of service.

In general, the project follows a client-centered model of representation. We make no claim that this model is necessary for effective representation, and we do not always strictly adhere to its tenets. Nevertheless, we include readings on the topic in our class materials, devote class-time to it, and attempt to utilize it in our work on cases.

Under a client centered approach the lawyer helps identify problems from a client's perspective and actively involves the client in exploring potential solutions to their problems.[37] In contrast to the traditional model that makes clients responsible for overall "objectives" and lawyers responsible for "strategies," client-centered representation recognizes that there is no clear line between goals and strategies and that client input into both is essential. Under this model lawyers should not view themselves as expert technicians who, once a problem is identified, should focus on solving the problem without regard to communicating with the client and seeking the client's input. Instead, communication with, and input from, the client are essential to achieve optimal results and client satisfaction.

We have found that client-centered representation is especially challenging on appeal because there are few, if any, required court appearances at which the lawyer will necessarily interact with the client. Instead, the lawyer must make a conscious effort to communicate with the client and obtain the client's input. As with most lawyers, once a student becomes absorbed in an intellectually engaging research or writing task, it can be easy to forget that the client's interests are central. It is for this reason that we emphasize client-centered representation from the start. Students visit their clients even before reading the transcripts or learning much about the

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[37] *See* DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 16-24 (1991).

case. This frees them from the burden of having to give information to the client and they can use the visit to simply listen to their client's concerns. The clients are given copies of the transcripts,[38] and their ideas about how to approach the case are actively solicited. The students are required to keep in frequent communication with their clients.

The relationship established between the student and client is especially valuable when the client must decide whether to risk litigation. For clients found guilty after trial there is often a risk that the client could be convicted after retrial and receive a longer sentence. For those who plead guilty the stakes are usually higher because withdrawal of the plea generally voids the existing plea agreement. Charges that were dismissed can resurface and prosecutors are no longer bound to give sentence recommendations as required under the previous agreement. Whether to proceed can be a difficult decision for the client, but if a positive attorney-client relationship has been established, it may be very helpful to the client in making the final decision. Of course, when a client makes choices we feel are unwise, students (and attorneys) invariably ponder our role and the wisdom of client-centered representation. But we view this is a healthy reflection.

We believe that client-centered representation is particularly well suited for use in law school clinics.[39] Student inexperience requires attention to ideas from others, including clients, about their cases. The client-centered model encourages the students to listen actively, a skill that will serve them well as attorneys of any kind.

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[38] The Public Defender does not pay for the copying of transcripts to be provided to the client. The project provides the transcripts at its own cost because we believe it is a small price to pay for the valuable input that can come from the clients, as well as the benefit to the attorney-client relationship.

[39] *See* Katherine R. Kruse, *Biting Off What They Can Chew: Strategies For Involving Students In Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405, 424 (2002) (recognizing that in the client-centered model, the client provides what the law student lacks in the background information necessary to solve the client's problems).

Core Principle #5: The ability to use facts to tell a persuasive story, guided by a clear theory of the case, is crucial to effective appellate representation.

Rules for effective writing apply to brief-writing. For example, good writing requires both clarity and organization. We spend very little time in class on rules for effective writing. However, we do spend some class time on the conventions of appellate brief-writing—for example, how to write certain parts of a brief (Point Headings, Standard of Review, Statement of Issues, Conclusion, etc). We also spend time teaching such topics as how to properly cite the record and other authority, and strategies to deal with adverse caselaw.

But our fifth core principle embraces two aspects of effective appellate advocacy to which we pay particular attention. We believe they are both fundamental and often overlooked: (1) using facts to tell a persuasive story, and (2) following a clear, concise, consistent, and credible theory of the case.

We continually stress the importance of facts to an appeal. We emphasize that facts make law and that courts, in selecting the law to be applied in a case, can be moved by a fair but sympathetic presentation of those facts.[40] This message must be constantly reinforced because it runs counter to the traditional notion ingrained in many students and attorneys, that in deciding appeals, courts simply apply set principles of law to a fixed and unchanging set of facts.[41]

We illustrate this point by assigning students to watch Errol Morris' 1988 documentary, "The Thin Blue Line." It tells

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[40] In 1969, U.S. Supreme Court Justice Warren Burger opined that "[t]he shortcomings of today's law graduate lies not in a decent knowledge of law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made." Chief Justice Warren Burger, Address Before the ABA Convention Prayer Breakfast (Aug. 10, 1969) *quoted in* Dominick R. Vetri, *Educating the Lawyer: Clinical Experience as Integral Part of Legal Education*, 50 OR. L. REV. 51, 59-60 (1970).

[41] *See* Sandra Craig McKenzie, *Storytelling: A Different Voice for Legal Education*, 41 KAN. L. REV. 251 (1992) (discussing the value of lawyers as thinking about themselves as storytellers); *see also* Laflin, *supra* note 4, at 24-25 (discussing the need for storytelling in appellate briefs).

the true story how an innocent man, Randall Adams, came to be convicted of the murder of a police officer. After watching the movie, students read two decisions rendered by the Texas Court of Criminal Appeals in Adams' case, one issued in 1979,[42] before the film was released, the other in 1989,[43] after the film was released. In 1979, the court denied each of Adams' claims finding that Adams had waived his right to raise certain issues or that alleged errors were harmless. In 1989, many of the same claims were reconsidered. This time the results were different. Issues that previously had been found waived were now cognizable. Errors that had been labeled "harmless" were now "prejudicial." The implication is obvious: Morris' ability to craft a persuasive story, not legal doctrine, won Adams' freedom.

Although it is clear that Morris believes in Adams' innocence and that the trial was a sham, he remains unobtrusive and weaves the story in a way that appears objective and balanced. It's an illusion; he is actually persuading viewers to embrace his own conclusions about Adams and the trial. In part, he does this by "showing, not telling." The prosecutor, judge, and key witnesses are given the floor. They *think* they are describing the fairness of the process and the fact of Adams' guilt, but they are actually doing just the opposite. In class we stress describing actions and using the words of the actors persuasively. We let the reader draw their own conclusions but we try to "show" the story in a way that makes the conclusion obvious, even if left unsaid.

Morris uses many other techniques that can be used in brief-writing to create a persuasive story: attention to setting and context, character development, use of flashbacks, irony, humor, and many more. These devices are well known to storytellers; they are too often unknown to brief-writers. By studying Morris' use of them in the film, we hope to stimulate students to think of ways to tell their client's story persuasively in a brief. The aim is to make the court *want* to find ways

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[42] Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979).
[43] *Ex Parte* Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989).

to rule in the client's favor.

The other aspect of our fifth core principle is an emphasis on developing a theory of the case. A good theory of the case must have several qualities. It must be clearly stated and avoid ambiguities. It must be concise; if it cannot be stated in a short paragraph, it is probably too complex. While there may be more than one theory in a brief (usually regarding unrelated issues) care must be taken that none of the theories undermines another. Finally, the theory must be realistic, given the facts, and the applicable law.

In formulating the theory of the case, we ask the students to devise a concise one paragraph explanation, intertwining facts, law, and emotions, of why the client deserves to win the appeal. We require students to say what they would say if they were trying to explain why the result is unjust to a person who knows nothing about the case or the law in general. Although this sounds easy, students find it difficult. Some have trouble distinguishing the important, legally relevant facts from irrelevant facts, leading to confusing, overly lengthy factual descriptions. Other students have difficulty summarizing legal rules in a concise, comprehensible manner. Some try to do the impossible by attempting to make the client appear to be sympathetic when the focus ought to be on some aspect of the process or someone other than the client. Still others fail to properly intertwine fact and law.

Because of these challenges we think it useful for students to practice formulating case theories in hypotheticals before they tackle their own cases. We ask all students to read the same "canned fact situation" and produce three separate explanations of the case each one focusing on a different theory. After the students have written their explanations, we show the class some of the various and creative ways the case can be framed.

After working on developing a theory of the case, we work on writing a Statement of Facts. Once again, using the same set of canned facts used in the "theory of the case" assignment, we ask students to write two different "Statement of Facts" for an appellate brief. One is written from the perspec-

tive of the prosecution, and one is written on behalf of the defendant. By requiring the students to take both perspectives, we hope they will see that writing a Statement of Facts requires making choices about which facts to emphasize and how to weave the facts together into a story that is fair, but sympathetic for a particular side. One observation that comes out of this exercise is the realization that, depending on which theory is chosen, the same facts might be viewed as both favorable or unfavorable.[44]

After the students have practiced writing case theories and fact statements, we assign them to apply their skills to one of their own cases. They explain (in writing) their theory of their case and then draft the first portions of an appellate brief (*i.e.,* a Statement of Issues, Statement on Oral Argument and Publication, Statement of the Case, and the Statement of Facts). The students distribute copies to each student (and supervisor) in their small group. The group reads it and makes editing suggestions on the copy. Then the small group meets to discuss the student's work and offer constructive suggestions. We have found the group-editing process helpful because it exposes students to different writing strategies, forces them to think critically about what writing techniques are most effective, and gives them ideas for improving their own briefs.

Obviously, the group-editing process is time-consuming, and we seldom have sufficient time to be able to elicit everyone's opinion on all aspects of a brief. In practice, the supervising attorneys usually give most of the feedback at these sessions, in part because they have spent more time than the students reviewing the briefs, and in part because

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[44] A simple example of this: The defendant—Tom—has been convicted of an armed robbery, mostly on the eyewitness testimony of the victim who selected him out of a lineup. Although the victim does not know Tom, they both live in the same large apartment complex. This fact can be cast in two different ways. It can be a favorable fact for Tom because the victim may have picked him out of the lineup based on the fact that he looked familiar, but confused where he had seen him. Or, it might be unfavorable for Tom because it places Tom in the vicinity at the time of the crime.

the students tend to defer to their supervisors' expertise in the limited class time we have. To remedy that, we are considering breaking the class down into even smaller groups with one supervising attorney per group. But even as currently constructed, we believe the group editing sessions are valuable because they provide additional motivation for students to produce their best work, and much can be learned from criticizing and observing criticism of other students' writing. The students then use the feedback to rewrite another draft of this first portion of the brief.

After this round of writing, the students write a first draft of the "Argument Section." Once again, they provide copies to the other students and supervisors, and once again, the small group meets to offer suggestions and comments.

Finally, students turn in a final draft of their appellate brief by the end of the second semester. In some cases, this brief coincides with the brief that will be submitted to the court of appeals. In other cases, the brief will be used when, and if, the case reaches that stage. Either way, all of the students should have by the end of the program written a high quality appellate brief.

Core principle #6: Students should be encouraged to reflect on their work and on the criminal justice system.

Like any system, the criminal justice system constantly evolves. Some parts of the system were developed in reaction to circumstances that no longer exist. Other parts are vibrant and relevant and should be preserved. We hope to produce lawyers who reflect upon the justice system and their role in it.

We try to encourage students to reflect on ways the justice system serves or disserves the ends of justice. We have not done this in a systematic way, perhaps because of the breadth of the topic.[45] But in our discussions and lectures, we

[45] For several years, we required students to write a reflective paper based on their experiences in the project. While this was successful in stimulating reflective thought, we later reluctantly abandoned this requirement in favor of a final ex-

try to encourage reflective thought by posing provocative questions about whether certain aspects of the system make sense. When a student is assigned to draft a motion (*e.g.*, a motion for bail pending appeal or a motion for an extension of time) we do not show them forms or prior examples of such motions. Rather, we ask them to think about what ought to go in such a motion and then tell them to state it concisely. If convention requires the addition of prescribed language, this can be added later. But the students should learn that motions are not an incantation of magical words, but—at their core—are simply a communication to the court requesting relief.

There is at least one other way we try to encourage reflection by our students. At the end of each semester we devote a class session to students' observations on the course, and on the criminal justice system. For example, we ask: what about the criminal justice system has surprised you; what would you do to change the system if you could; and in what ways does the system work well? Students' views of the system may be skewed by what occurred in their own two cases, but often their observations are insightful and are the product of their knowledge of other cases from the class combined with other prior knowledge. The point is not to move the students to come to any particular conclusions about the system, but to encourage them to think about what they are doing, and why they are doing it.

IV. Conclusion

After several years of experimenting, the Criminal Appeals Project has achieved a measure of stability, based on the core values expressed in this article. Although we believe the current project is largely successful, there are aspects that still can be improved. For example, we need to more fully engage all of the students. We may need to tinker with the case selection procedure to ensure that none of the cases fold

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amination that covered class materials and lectures. It would be possible to maintain the paper requirement, but time spent on the paper likely detracts from time that would have been spent on the case.

within days or weeks of our receipt of them. Finally, we need to think of ways to relieve the pressures to adequately fund the program. By continuing to scrutinize the project through our own reflection, through feedback from students, and through the experiences of other clinical programs, we will continue the search for creative new ways to achieve our goal of providing quality service to both students and clients.

THE NEW HAMPSHIRE APPELLATE DEFENDER PROGRAM: AN APPRENTICESHIP CLINIC

Christopher M. Johnson[*]

Most law school clinical programs are born out of the inspiration and initiative of law school faculty and administration. Although law school clinics generally need the cooperation of courts and other agencies in order to function, the law school retains primary control over the clinic's structure, rules, and activities. In this article, I describe a clinical program that, in origin and in operation, follows a different model. Unlike the founding of most law school clinical programs, the creation of the Appellate Defender Clinic at the Franklin Pierce Law Center ("Pierce Law") more closely resembled a marriage than a birth. In establishing the clinic, Pierce Law and the New Hampshire Public Defender cooperated to create an institution that belongs to each as much as it belongs to the other.

As New Hampshire's Chief Appellate Defender since October 2001, I share with three public defender attorneys the responsibility of representing most of the indigent criminal appellants in the New Hampshire Supreme Court, the state's only appellate court. I also hold a tenure-track faculty appointment at Pierce Law. In that capacity, I teach one doctrinal class each semester in addition to supervising the students enrolled in the Appellate Defender clinic.

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[*] Professor of Law and Chief Appellate Defender. I owe a debt of gratitude to my teaching colleagues Kimberly Kirkland, Ellen Musinsky, and Sophie Sparrow, and to my current Appellate Defender colleagues, David Rothstein, Andrew Winters, and Ted Lothstein, for their valuable insights and comments on earlier drafts of this article.

As a result of its unusual structure, the Appellate Defender clinic operates as a kind of pedagogical compound. As in traditional clinics, Appellate Defender students learn by doing much of the work of an appellate lawyer. As in externships, students also learn by watching the Appellate Defender lawyers litigate appeals. Finally, as in classroom courses, students read a text that encourages theoretical thinking about appellate work and participate in wide-ranging discussions. In this Article, after describing the history and structure of the Appellate Defender Program, I identify some of the unique pedagogical opportunities and challenges created by its composite structure.

I. THE ORIGINS OF THE APPELLATE DEFENDER PROGRAM

In the early 1970s, the New Hampshire Legislature established the state's first public defender program and by 1981 that program covered the whole state.[1] At present, the New Hampshire Public Defender employs more than ninety lawyers, most stationed in one of the nine regional offices focused on trial practice. The Appellate Defender comprises a tenth office, defined not geographically, but by its appellate function. The New Hampshire Supreme Court appoints the Appellate Defender not only to represent clients represented by Public Defenders at trial, but also other indigent criminal appellants, such as those who elected self-representation at trial, retained counsel, or for some other reason had a non-public defender trial lawyer.

In 1980, when both Pierce Law and the Public Defender remained very new institutions,[2] James E. Duggan, then a public defender who also taught at Pierce Law and now an Associate Justice of the New Hampshire Supreme Court, received a one-year grant to establish New Hampshire's first appellate public defender. During that first year, Duggan

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[1] *See, e.g.*, 1973 N.H. Laws, ch. 463; 1977 N.H. Laws, ch. 296; 1981 N.H. Laws, ch. 568 (codifying N.H. REV. STAT. ANN. § 604-B (West, Westlaw through 2005 Reg. Sess.)).

[2] The Franklin Pierce Law Center first opened its doors in the fall of 1973.

handled a full appellate caseload, while assisting the private lawyers appointed to supplement his efforts. In 1981, because of the success of the program in its first year, and with the encouragement of the New Hampshire Supreme Court, Pierce Law and the Public Defender decided to provide the funding and institutional support necessary to continue and expand the program. Duggan hired a second lawyer, eliminating the private bar's direct participation, and served as Chief Appellate Defender until his appointment, effective January 2001, to the New Hampshire Supreme Court.

By statute, the Public Defender may "subcontract for attorney services, including appellate services, as may be necessary . . . ."[3] Pursuant to a contract between Pierce Law and the Public Defender, the school provides statewide appellate public defender services through the Appellate Defender Program, housed on the Pierce Law campus.[4] In recognition of the job's split responsibilities, the Public Defender and Pierce Law each pay a part of the salary of the Chief Appellate Defender.[5] At present, the staff includes a deputy chief, stationed indefinitely with the Appellate Defender, and two other lawyers, each serving a two-year rotation in the office. At the end of their rotations, those lawyers will return to Public Defender trial offices.[6]

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[3] N.H. REV. STAT. ANN. § 604-B:4 (2005).

[4] In consideration for the appellate services rendered under the contract, the Public Defender pays Pierce Law an annual sum to cover expenses such as rent, supplies, equipment, and the salary of the office administrator.

[5] The contract provides that Pierce Law and the Public Defender shall cooperate in hiring the Chief Appellate Defender who then selects, with the concurrence of the Public Defender, three Public Defender lawyers to act as Assistant Appellate Defenders. The Public Defender pays their salaries, according to its pay scales.

[6] The contract contemplates increasing the number of assistant appellate defenders, if the number of cases open and active at any one time exceeds the contractually specified limit of seventy-five.

II. The Structure of the Appellate Defender Clinic.

During its twenty-five years, the Appellate Defender clinic has taken various forms, and it continues to develop each semester. At present, only upper-class students who have completed a course in Criminal Procedure may enroll in the clinic. Unlike appellate clinics at some law schools,[7] the Appellate Defender clinic lasts one semester, and enrolled students earn three credits. Because of the intensive nature of the research and writing, the clinic fulfills the ABA requirement of an upper-level writing course.[8]

The clinic operates year-round, although it attracts more students during the academic semesters than during the summer. The relatively modest prerequisite requirement and the clinic's one semester duration serve to make it available to a broad range of students. To maintain the intensity and quality of the clinical program, in light of the involvement of students entering with varying skills and substantive knowledge, and in light of the lawyers' significant non-teaching responsibilities, enrollment in the clinic is limited to four students per semester.[9]

At the beginning of the semester, the students meet collectively on several occasions in classroom sessions in which, after reading chapters of a book on written advocacy, they analyze and discuss briefs recently written by Appellate De-

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[7] *See* Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 Gonz. L. Rev. 1, 13 (1997/98) (describing appellate clinic at the University of Idaho College of Law); Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the* Sandbag, 45 Am. U. L. Rev. 859, 869 (1996) (describing appellate clinic at St. Thomas University School of Law). *Cf.* J. Thomas Sullivan, *Teaching Appellate Advocacy in an Appellate Clinical Law Program*, 22 Seton Hall. L. Rev. 1277 (1992) (describing one-semester clinic at Southern Methodist University law school).

[8] ABA Standards and Rules of Procedure for Approval of Law Schools 2004-05, Standard 302(a)(3).

[9] *See* Sullivan, *supra* note 7, at 1288, 1306 (noting that "intensive nature of the case workload . . . severely limited the number of students who could be managed adequately by the single supervising attorney . . . .").

fender lawyers with the authoring lawyers. Early in the semester, each student receives a trial transcript and other documents relevant to the first appeal on which the student will work. Under the supervision of the attorney assigned to that case, the student drafts and, with the benefit of the supervising attorney's comments, redrafts each section of the brief until the student produces a satisfactory final version. Meanwhile, that attorney also reads the record and prepares a brief in the case. After the student produces a final version of the brief, the student reads the lawyer's brief and can see the extent to which the lawyer incorporated the student's ideas and formulations. The student and the lawyer can then discuss the choices reflected in the approaches each has taken to the strategic questions presented by the case. At an appropriate point mid-semester, each student receives the record of a second case and begins the process again, working with a different appellate lawyer.

In addition to writing two briefs, each student participates more generally in the work of the Appellate Defender. Students receive draft briefs circulated by Appellate Defender attorneys, and must read them and return timely substantive comments and editorial suggestions. Each student accompanies an attorney on at least one visit to an incarcerated client on whose case the student is working. Students attend, and are encouraged to participate as questioning judges, moot arguments made by attorneys preparing for oral argument. Students also attend oral arguments in the New Hampshire Supreme Court. In order to encourage discussion about observed oral arguments and about the client meeting, students write short reaction papers reporting their observations and reflections about those experiences.

Under the current version of New Hampshire's student practice rule, law students may practice in the trial courts under certain conditions, but not in the New Hampshire Supreme Court.[10] Clinic students, therefore, cannot orally argue the appeals on which they work. The clinic strives to provide

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[10] N.H. SUP. CT. R. 36(1).

students the best available substitute for that experience by requiring them to present an oral argument to a panel composed of the Appellate Defender lawyers.

One important difference between the Appellate Defender and traditional clinics involves the issue of case selection. Traditional clinics can often screen cases before agreeing to undertake representation.[11] Lawyers experienced in running traditional clinics have sought to develop criteria designed to identify the most educationally-promising cases.[12] Having identified such cases traditional clinics can accept only those cases, while declining others.

The Appellate Defender, however, cannot select its cases based on educational or any other criteria. Absent some disqualifying conflict of interest,[13] the New Hampshire Supreme Court appoints the Appellate Defender to represent all indigent appellants convicted of any crime more serious than a Class B misdemeanor. Appellate Defender lawyers choose which open and active cases to assign to students, but the scope for choice remains fairly small.

On any given day, the Appellate Defender may have between ten and twenty cases with transcripts prepared, and briefing deadlines set. Given the Supreme Court's practice of setting briefing deadlines sixty days after preparation of the trial transcript, the list of cases available for assignment to students on the day they arrive at the clinic is limited to those cases having a briefing deadline more than a month away. The Appellate Defender could, in theory, assign students cases on which the attorney has essentially completed work. Such an assignment though, would defeat two important advantages of the Appellate Defender clinic: the chance for the student to observe the lawyer working on the same case at the same time; and the chance for a student's work to contribute to the

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[11] *See, e.g.,* Laflin, *supra* note 7, at 9-11 (discussing case selection).

[12] *See, e.g.,* Phillip W. Broadhead, *A Model Program for Establishing a 1993 Criminal Appeals Clinic at your Law School: More Bang for the Buck*, 75 MISS. L.J. 671 (2006).

[13] For example, when co-defendants separately appeal.

quality of the brief actually filed. Thus, excluding the half of the cases on the list having too-near deadlines, the pool of candidate cases often shrinks to between five and ten.

When the lawyers also exclude cases having transcripts too voluminous for even the most diligent student to manage in the time allowed or too slender to confront a student with an adequate fact-statement drafting challenge, the list of candidates can shrink further. The lawyers screen the remaining cases for relatively meritorious issues, but the conclusions reached before a careful reading of the transcript and before researching the issues raised are somewhat speculative. Thus, it inevitably happens that, for some students, one of the briefs they have to write will raise no substantial appellate claim.

The challenge posed by frivolous and near-frivolous claims is not only pedagogical but also ethical and confronts not only students and teachers but also all appellate lawyers who cannot select their cases. The ethical quandary arises from the rule prohibiting the filing of frivolous pleadings.[14]

In *Anders v. California*,[15] the United States Supreme Court held that states may establish procedures by which a criminal appellate lawyer can tell the reviewing court that his client's case lacks a meritorious claim.[16] The New Hampshire Supreme Court, in a case litigated by the Appellate Defender, rejected the *Anders* rule.[17] Instead, lawyers in New Hampshire who find themselves handling a frivolous appeal, must consult with, and advise, the client, but if, after consultation and advice, a client prefers to proceed with the appeal, New Hampshire lawyers must "argue[] the defendant's case as well as possible."[18]

As the New Hampshire Supreme Court noted in *Cigic*, truly frivolous appeals are "extremely rare."[19] However, the court, in explaining that assertion, properly excluded from the

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[14] N.H. RULE OF PROF'L CONDUCT 3.1.
[15] 386 U.S. 738 (1967).
[16] *Id.* at 744.
[17] State v. Cigic, 639 A.2d 251 (N.H. 1994).
[18] *Id.* at 254.
[19] *Id.* at 253.

truly frivolous category appeals seeking "an extension, modification, or reversal of existing law."[20] While some appeals seeking a change in the law may have substantial merit, many such claims, although not technically frivolous, have no real hope of success. I now turn to discuss that and other pedagogical opportunities and challenges arising out of the structure of the Appellate Defender clinic.

III. Pedagogical Challenges and Opportunities of the Appellate Defender Clinic

The Appellate Defender clinic shares many features with other criminal appeals clinics. Students work on real cases for clients the program represents, under the supervision of experienced lawyers, who offer them intensive and practical instruction in legal research and writing. I refrain here from discussing the many important issues common to all criminal appeals clinics. Other articles in this Symposium, and articles published elsewhere, discuss such issues thoroughly and insightfully.[21] Instead, I focus here on the variations in instruction and emphasis that arise out of the unique structure of the Appellate Defender clinic.

A. "What Are We Going To Do With This Case?" Reflections on Frivolous Appeals

As the principal provider in New Hampshire of appellate representation to indigent criminal defendants, the Appellate Defender cannot choose its cases. As already noted, that fact results in students having to work occasionally on appeals raising no substantial claims. That circumstance creates a pedagogical dilemma perhaps best stated in the form of a question: "So what are we going to do with *this* case?" My experience with this problem has yielded several relevant lessons.

First, one should not overstate the frequency of the prob-

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[20] *Id.*

[21] *See, e.g.*, Ronner, *supra* note 7.

lem. Most cases, once subjected to the Appellate Defender's processes of intensive and collective analysis, yield at least one plausible, non-frivolous claim. Indeed, clinic students often get to work on cases having a real chance of success, that require considerable research and effort in the development of the argument. Furthermore, the New Hampshire Supreme Court's recent adoption of a plain error rule will tend to reduce the problem by expanding the field in which appellate counsel may search for claims.[22] Thus, many more appeals present claims with some chance of success than present claims with no chance at all.

Second, even the relatively low-merit, but non-frivolous appeal can afford students a rich educational opportunity. The process of finding and articulating the claim alone leads students into thickets of caselaw and legislative history, as students seek to evade what appear at first to constitute obvious replies and fatal flaws. Having identified the claim, students must seek reasons to support the rule on which the claim depends. That process often requires students to develop a sophisticated understanding of the policies underlying the relevant statutes or rules. In short, the process of building a plausible claim out of sparse materials confronts students, as it confronts lawyers, with a singularly great challenge that draws on a wide range of imaginative research and writing skills. Looking back on the process from the vantage point of the completed brief, students also learn a valuable lesson about the virtue of perseverance and the need to maintain hope and an open mind in the face of major obstacles.

Third, even the truly frivolous appeal offers important lessons. Where the meritorious appeal invites students into conversations about the meaning, purpose, and interrelationship of statutes, rules, and constitutional provisions, the frivolous appeal requires hard conversations with clients and an understanding of the boundaries of ethical argument in a regime requiring the lawyer to argue frivolous claims "as well

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[22] N.H. SUP. CT. R. 16(a).

as possible."[23]

Ethical lawyers must develop the ability to tell a client, when necessary, unpleasant truths.[24] No prisoner facing years of incarceration wants to hear that the appeal, on which rests all the prisoner's remaining hopes, has no chance of success. Some prisoners in that position refuse to believe such an assessment. Some prisoners lack the psychological strength to survive their grim daily routine if told by their lawyer that their appeal will fail. Other prisoners need to know their chances and would suffer greater damage from the encouragement of false hope than from hearing of the sad truth.

When students work on cases having little or no chance of success, they ask their supervising attorney what the attorney will tell the client. To reply that the lawyer will tell the client the truth only begins to give an answer, for truths may be told in many ways, and as much can depend on the manner as on the message. A wide variety of topics may arise in those difficult attorney-client meetings. Lawyers usually begin by talking about the controlling law that defeats the claim, in an effort to explain to someone without a legal education why the law does not support the argument. Those discussions about the law often become conversations about people. Some clients express doubts about the integrity and independence of a Public Defender paid by the same government that pays the prosecutors and who, in the eyes of the client, may seemingly prefer to argue the prosecutor's position. The conversations can also shift to the client's goals and values as a client wonders about the advantages, if any, the client might reap by withdrawing the appeal.[25] Or the client may explain a

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[23] *Cigic*, 639 A.2d at 254.

[24] Sophie Sparrow, Professor of law and the Director of the First Year Writing Program at Pierce Law, notes that first year students often struggle with the task of writing a predictive/objective memorandum for a hypothetical client that suggests that the client might lose. It is, perhaps, natural to find psychologically difficult the chore of delivering bad news in plain, direct language to a person for whom one feels sympathy and responsibility.

[25] For example, remission of the cost of the appeal. The Office of Cost Containment, a New Hampshire governmental agency, seeks repayment from indigent defendants of the cost of their defense. *See* N.H. REV. STAT. ANN. § 604-A:9

heartfelt desire to challenge a conviction, even on frivolous grounds, for reasons wholly independent of the likelihood of success. Some clients despair upon hearing that their appeals will fail and need the lawyer to help identify a path that leaves at least some hope for a better life. Students can learn much from watching a lawyer, to better or worse effect, engaging in one of those delicate and important conversations.

Frivolous appeals not withdrawn by clients also impose another delicate and important duty on lawyers that students benefit by observing: how does one argue a frivolous appeal "as well as possible?"[26] Again, the ethical rule barring lawyers from making misrepresentations in court constitutes a touchstone governing the framing of the argument, but the touchstone does not answer all questions. Should the lawyer ignore material adverse facts, or should the lawyer acknowledge them by making the best possible, but still extremely weak, argument for their immateriality? Should the lawyer try to distinguish some precedent involving similar facts, or should the lawyer offer the best, albeit weak, argument to overrule the precedent? Finding the right answers to these questions in a particular case may require the lawyer and the student working on the case to interpret and apply the law controlling the claim and the law marking the limits of ethical conduct. Watching lawyers struggle with such challenges advances students' education in legal ethics.

B. Whose Case Is It Really?

Many scholars, commenting on clinical legal education, note the powerful incentive of student effort and learning created by the experience of bearing ultimate responsibility for a real client's case.[27] The Appellate Defender clinic faces a challenge in this regard. Although students work on real cas-

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(West, Westlaw through 2005 Reg. Sess.).

[26] *Cigic*, 639 A.2d at 254.

[27] *See, e.g.*, Laflin, *supra* note 7; David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor Reconceptualizing the Supervisor-Student Client Relationship*, 51 SMU L. REV. 1507, 1531-32 (1998).

es, and meet the real client whose future depends on the outcome of the case, the students know that the supervising attorney will brief and argue the appeals. Four years worth of attention to the clinic's students has taught me several lessons about the implications of this circumstance for the clinic and also some techniques for managing the challenge.

First, students vary in the extent of the effort they devote to their cases. The best students engage fully in the process, knowing that their work can influence and improve the supervising lawyer's brief and thus directly benefit the client. Students understand that the educational value of the clinic to them increases in proportion to the time and effort they dedicate to it. Those desiring to join the relatively small New Hampshire bar undoubtedly take note of the career benefits that accrue to a student who makes a favorable impression on the Appellate Defender lawyers. Weaker and less motivated students try to get through the clinic, as they try to get through law school, by working close to the line dividing minimally adequate work from failing work. The clinic's low enrollment cap allows the supervising attorneys to identify such students early and to respond by increasing the number of required drafts and feedback meetings, so as to set the minimal adequacy bar as high as reasonably possible.

Second, many of the students who enroll in the Appellate Defender clinic also participate during their law school careers in one of the Law Center's several trial practice clinics, in which students speak in court for a client. Law students often find their first experience of speaking for a client in court unforgettable. Having once had the experience of seeing a client's vulnerability when confronted with the machinery of justice, few students require a reminder, and most thus take seriously their relatively smaller responsibility in the Appellate Defender clinic for the client's fate. Students without prior clinical experience often have a similarly motivating event when, in their first visit behind prison walls, they meet a client who vividly manifests deeply human qualities of confusion, frustration, hope, and fear. In her post-prison visit reaction memo, after describing how little her client conformed

to the socially prevalent perception of imprisoned persons as inhuman monsters, one student reported having an unexpected emotional reaction to the visit; she wept.

Third, the fact that a lawyer writes a brief in each case on which a student works brings certain educational advantages. Each student gets the benefit of discussions about the case with, and comments on the student's work made by, a lawyer whose thorough familiarity with the transcript and the case's particular research and drafting dilemmas arise out of the lawyer's simultaneous confrontation with those same dilemmas. Indeed, the distinguishing feature of the Appellate Defender clinic's pedagogical method is its creation of a kind of apprenticeship in which students both watch experienced practitioners perform the litigation tasks in a real case and perform those tasks themselves under the supervision of that lawyer.

Scholars of teaching recognize that students can learn a great deal when they combine the activity of watching accomplished practitioners perform their craft with the activity of attempting to do the task themselves. For example, in *Cognitive Apprenticeship: Teaching the Crafts of Reading, Writing, and Mathematics*, Collins and his co-authors set out the theoretical justification for teaching via the apprenticeship model:

> [T]he apprentice repeatedly observes the master executing (or modeling) the target process, which usually involves some different but interrelated subskills. The apprentice then attempts to execute the process with guidance and help from the master (i.e., coaching). A key aspect of coaching is the provision of scaffolding, which is the support, in the form of reminders and help, that the apprentice requires to approximate the execution of the entire composite of skills. Once the learner has the grasp of the target skill, the master reduces (or fades) his participation, providing only limited hints, refinements, and feedback to the learner, who practices by successively approximating smooth execution of the whole skill.[28]

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[28] Allan Collins, John Seely Brown, & Susan E. Newman, *Cognitive Appren-*

As adapted to the cognitive nature of the target skills involved in the law school clinical setting, that paragraph describes the teaching method to which the Appellate Defender clinic aspires.[29] "Thus, rather than transmitting expertise through theory and propositional discourse or leaving the novice entirely to the lessons of her own tasks, the expert can display her own understandings and performances and explore her own exemplars of practice so as to guide the novice's quest for competence."[30] By showing the student so explicitly the lawyer's own learning process through the course of the case, the clinic aims to encourage students to become conscious of the process by which they also learn.[31]

C. Who Are These Lawyers?

The discussions above make clear that the success of the Appellate Defender clinic depends on the qualities of the supervising attorneys.[32] The example of a supervising lawyer's practices and habits, for good or ill, may prove influential to students who often have little or no other experience of seeing, so fully exposed to their view, the dilemmas of law practice. In several respects, the New Hampshire Public Defender attorneys who staff the Appellate Defender clinic set a distinctive example.

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ticeship: Teaching the Craft of Reading, Writing, and Mathematics, *in* KNOWING, LEARNING, AND INSTRUCTION: ESSAYS IN HONOR OF ROBERT GLASER 453, 456 (L.B. Resnick ed., 1989).

[29] *See* Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1, 27-33 (1999) (noting educational value of cognitive apprenticeship relationship).

[30] Baker, *supra* note 29, at 73.

[31] For a fuller discussion of the advantages of self-conscious learning, or "metacognition," *see, e.g.*, Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1 (2003). I am indebted here also to Professor Sophie Sparrow, who gave me a copy of the materials she created in conjunction with a workshop titled *Introduction to Teaching Metacognition: Helping Students Reflect Upon Their Learning*.

[32] *See* Sullivan, *supra* note 7, at 1295 (noting dependence of success of clinic on supervising attorney's skills as teacher and as litigator).

First, the Appellate Defender program emphasizes teaching and learning, not only in the context of the clinic, but more generally. I teach a doctrinal course every semester, and the deputy regularly teaches a course in advanced appellate advocacy. Before entering the clinic, many students know one or more of the lawyers, and for that reason feel more comfortable both in seeking our help and in challenging our assumptions.

Moreover, the New Hampshire Public Defender emphasizes continuing legal education in a variety of respects. For example, newly-hired Public Defenders undergo a month-long period of training at the outset of their careers, and many Public Defender lawyers teach during new lawyer training. By the time they arrive to do a two-year rotation at the Appellate Defender, most Assistant Appellate Defenders have had the experience of teaching their skills to less experienced lawyers.

Once enrolled in the clinic, students see the briefs, the moots, and the oral arguments, not only of the most experienced appellate lawyers, but also of the attorneys filling the two-year rotating slots. That variety not only exposes students to a diversity of styles, but also allows students to inspect the work of attorneys at different stages of development as appellate lawyers. Students also watch as, in the substantially non-hierarchical working relationship of the Appellate Defender lawyers, the more experienced lawyers learn from the newer appellate practitioners.

Second, to some extent, students become part of the larger organization – the New Hampshire Public Defender – of which the Appellate Defender is itself a part. With some frequency, trial attorneys dealing with issues in pending cases consult with Appellate Defender lawyers, and the legal dimensions of the quandaries raised in those conversations can become subjects of discussion amongst the Appellate Defender lawyers. Where appropriate, the lawyers involve the students in those discussions and in research projects arising from them. Through those discussions and conversations about the appellate cases on which the students work, students also begin to gain some appreciation of matters of trial strategy and practice that explain why a trial lawyer raised an argument in a certain

way or neglected to make a different argument.

By association with New Hampshire Public Defender lawyers, students also encounter that organization's characteristically high morale and level of accomplishment. The Public Defender enjoys a good reputation nationally.[33] The program's commitment to vertical representation in the trial offices produces well-rounded lawyers who deliver high-quality representation.[34] Trial lawyers who come to the Appellate Defender thus bring with them a wealth of experience about trial practice in all its phases.

Third, and perhaps this constitutes the principal structural advantage of the Appellate Defender clinic, the students work with appellate attorneys who currently write and argue appeals. Every year each Appellate Defender lawyer files between fifteen and twenty-four briefs and has almost as many oral arguments. Students thus learn from lawyers who, through their own current appellate practice, are themselves constantly learning and refining their own techniques.

IV. CONCLUSION

The Appellate Defender Clinic's method adopts features of several different models of instruction. Like doctrinal courses taught in classrooms, the clinic has a classroom component in which students assimilate the lessons of a text on legal writing and reasoning and discuss the tactical, doctrinal, interpersonal, and ethical dilemmas that arise in the setting of a law office handling indigent criminal appeals. Unlike doctrinal courses, but as in traditional clinics, the Appellate Defender program also engages students in the process of learning by doing. Students read transcripts, research issues, write briefs, and make

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[33] *See, e.g.*, Ronald W. Schneider, Jr., *A Measure of our Justice System: A Look at Maine's Indigent Criminal Defense Delivery System*, 48 ME. L. REV. 335, 338-39 (1996).

[34] On the advantages of vertical representation, *see, e.g.*, Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 262-63 (2004); Tony Fabelo, *What Policy Makers Need to Know to Improve Indigent Defense Systems*, 29 N.Y.U. REV. L. & SOC. CHANGE 135, 145 (2004).

an oral argument. Traditional clinics do not generally have instructors handle any significant number of cases apart from those on which the students work. Thus, unlike traditional clinics, but as in externship settings, the Appellate Defender Clinic engages students substantially in the process of learning by watching experienced lawyers practice. Students read the briefs written by Appellate Defender lawyers, watch their arguments, and talk with them about the dilemmas arising in the work. Finally, unlike many externships, Appellate Defender students do not work only on the kinds of contained, specific tasks often defined by externship supervisors who seek to complete some larger project with the student's help. Instead, Appellate Defender Clinic students undertake, for their cases, the same broad range of tasks that the lawyer performs.

Perhaps inevitably, the integration of all of those models of learning into a single program produces drawbacks as well as benefits. The rule barring student practice in New Hampshire's appellate court imposes limits on the depth of the learning by doing, as compared with clinics in which students file the brief and argue the appeal. The obligations of the clinic's lawyers to their clients and cases sets limits on the time they can devote to their teaching roles. Yet, by devices such as the low enrollment cap, the Appellate Defender accommodates those limits in such a way as to maintain a program having great educational value. In turn, those accommodations require others. In order to offer the educational benefits to as many students as possible in light of the low enrollment cap, the program draws in a new group of students every semester. In the end, the program aims to offer a unique educational experience by incorporating in a single setting learning by studying, doing, and watching.

In the course of writing this article and thinking about the Clinic, I have paused to envision future directions. Assuming the possibility of a rule change allowing student practice in the New Hampshire Supreme Court, the clinic could add a two-semester version which holds out to students the possibility of filing their own brief and giving oral argument in their cases. In that version, students who demonstrate the requisite ability during their first semester could, during their second, have

primary responsibility for filing a brief and/or arguing an appeal.

Such a two-semester version of the clinic would involve its own distinct challenges. For example, because of delays between the filing of the appellant's brief and the scheduling of oral argument, even a two-semester version might not allow enough time for one student to demonstrate sufficient mastery, file a brief, and argue the appeal in that same case. A student could perform all of those tasks in a single case only for a brief written relatively early in the student's term in the clinic, before the student had yet assimilated many of the lessons the two-semester experience offers. Alternatively, if a student filed a brief written during the student's second semester in the clinic, that student would almost certainly have finished the course and graduated before the court would call the case for oral argument. A lawyer or a different student would then have to make the oral argument in such a case.

A second question confronting the envisioned two-semester version involves client consent to student representation. Why do clients consent to representation by a law student? To that question, law school clinics can offer some extremely persuasive answers. Often, law school clinics serve clients who lack the means to afford counsel and lack any right to court-appointed counsel. The choice facing such clients, thus, is law school clinic representation or *pro se* representation. The Appellate Defender clinic, of course, cannot offer that answer, as its clients have a constitutional right to appointed counsel.

In that respect, the Appellate Defender clinic is not unique. Criminal trial practice clinics, for example, often represent clients who have a constitutional right to counsel, as do some appellate clinics. A second feature, however, distinguishes the Appellate Defender clinic from all of those clinics of which I am aware. Those clinics offering student-attorney representation as an alternative to licensed-practitioner representation exist apart from the institution that provides representation to the bulk of the similarly-situated client population. Such clinics, accordingly, can describe their advantages by comparison with that institution. Clinics carry a much smaller caseload than do

that institution's lawyers. The clinic has experienced practitioners on staff whose exclusive professional responsibility consists in supervising the student attorneys and ensuring that their work meets appropriate standards. Clients choose to accept representation by such clinics, thus, because the client's choice lies between a focused, reflective team of students and lawyers on the one hand, and an all-too-often overburdened, inadequately-supported institutional lawyer on the other. Such clinics can, with good reason, often accurately describe student-attorney representation as at least as competent as the available experienced-attorney alternative.

The Appellate Defender, however, occupies a different position in that analysis. Though busy keeping up with the brisk pace of deadlines, Appellate Defender lawyers regard themselves as having sufficient time and support to produce consistently first-rate work. In the two-semester version of the clinic, the client's choice therefore would lie between a student supervised by an Appellate Defender lawyer or that Appellate Defender lawyer him- or herself. Fairly or not, many incarcerated prisoners tend to regard public defenders with suspicion, often for having just been convicted at trial while represented by one. Such clients may view student representation as an evasion of attorney responsibility, rather than as a valuable supplement to an attorney's efforts.

Good answers to those concerns undoubtedly exist. For now, though, I conclude my contemplation on a hypothetical future version of the Appellate Defender clinic by returning to the essential method of the current version. In the future, as at present, I expect that the Appellate Defender's particular structure and constraints will continue to guide it toward an apprenticeship model. Such a model engages students simultaneously in learning by doing, by seeing fully exposed to their view the work processes of experienced practitioners, and by reflection and discussion about their experiences.

ON THE VALUE OF PRISON VISITS WITH INCARCERATED CLIENTS REPRESENTED ON APPEAL BY A LAW SCHOOL CRIMINAL DEFENSE CLINIC

Timothy H. Everett[*]

I. INTRODUCTION

The need for a professional visit between lawyer and client might seem self-evident on ethical grounds alone; a lawyer who represents a client must first understand the client's goals and must reach an understanding with the client concerning the terms, nature, and scope of representation.[1] However, the matter is not so simple in the appellate setting, particularly where counsel is appointed for an indigent defendant. Indigence for such a client means that he cannot retain counsel of choice and that he lacks any financial power in negotiating the non-financial terms of his representation by appointed counsel. The Supreme Court has made it clear that such a client does not have a constitutional right to control his court-appointed appellate counsel's strategy in selecting the legal issues raised in the client's brief and the issues emphasized at oral argument.[2] The Supreme Court has also held

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[1] MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4, 1.5 (2004).

[2] Jones v. Barnes, 463 U.S. 745 (1983). As noted later on, we begin our year long appellate clinic program with several classes on the attorney/client relation-

that there is no constitutional right to discharge appointed counsel and to proceed *pro se* on direct appeal in a criminal case.[3] The constitutional message is clear: individuals convicted of crimes do not steer the course of their cases on appeal.

Over the two decades that I have supervised appellate clinic students, I have found no part of the clinic curriculum any more important than taking students to meet face-to-face with appellate clients where the clients live: any one of Connecticut's eighteen correctional institutions. There is no aspect of my clinical supervision each year that is surer of didactic success than going to prison to meet with our appellate clients. Further, there is no more respectful communicative gesture toward an appellate client than an early visit to see him and discuss his appeal at his "place of confinement."[4] I write to tout the clinical value of such prison visits.

Prison visits provide a strong foundation for the kind of functional and respectful attorney/client relationship that is especially critical, for legal and pedagogical reasons, in conducting the business of an appellate criminal clinic in a law school. Counsel and client introduce themselves to each other and begin their professional relationship in the most appropriate possible setting: the prison at which the client is serving the sentence imposed pursuant to the judgment to be challenged on appeal. Respectful recognition of the client as a particular person surrounded by the reality of prison is a critical part of a law school clinic's representation of the client and the education of its students.

At the prison meeting, counsel and client develop regard for each other as individuals and as players with defined professional roles in the appellate process. Counsel and client can preview the appellate process together in a relatively colloquial fashion. Conversation in which the participants are present in the same place at the same time optimizes the prospects for

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ship and the decisional authority given counsel on appeal.

[3] Martinez v. Court of Appeals, 528 U.S. 152 (2000).

[4] Because our clinic represents indigent clients, they almost never are able to obtain their release by posting an appeal bond.

achieving and sustaining a communicative "momentum"[5] between attorney and client during the appeal process. The advantage of spoken language in a conversational mode is that the speaker and hearer can exchange their roles quickly and repeatedly, first one talking, then the other. Each speaker can make, or attempt to make, adjustments in how they are speaking—by changing of level of formality, tone and pitch, by making different lexical and idiomatic choices, etc.—in order to maximize the effectiveness of their communication.[6]

Of course, written communication will also be needed to establish the attorney/client relationship and to inform the client about the appellate process. However, exclusive reliance on written correspondence with an inmate client is problematic. Many individuals in a prison population cannot comfortably and effectively express themselves in writing. Indeed, many inmates seek help in understanding their legal correspondence from cell-mates, "jailhouse lawyers," and even corrections personnel. For these reasons, it is advantageous for correspondents (clients and lawyers alike) to have met each other at least once in person in order to better judge what may need greater or lesser explanation as they correspond with each other about the case.

The benefits of a prison visit are tangible as well as intangible. A solid interpersonal line of communication with an

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[5] WALLACE CHAFE, DISCOURSE, CONSCIOUSNESS, AND TIME: THE FLOW AND DISPLACEMENT OF CONSCIOUS EXPERIENCE IN SPEAKING AND WRITING 127, 135 (1994). The linguist, Wallace Chafe, used the term "momentum" in his description of the devices by which to achieve and sustain a conversational flow in which the speakers focus on a given topic. *Id.* The subject matter of a conversation ("topics" in a "discourse") must initially be "judged interesting" by one of the speakers ("an eliciter" and "a responder"). *Id.* at 135. Once the topic is broached, there are two alternative ways to sustain attention on the topic:

> Once a topic has become semiactive, it may be sustained through elicitation or narration. In elicitation, forward movement through the topic is driven by the interaction between two or more interlocutors, one functioning as the eliciter and another as a responder. Self-sustaining topics, those that doe not require interaction for their development, typically take the form of narratives.

Id.

[6] *See generally id.* at chs. 4, 10.

appellate client is, I think, a necessity so that counsel can determine with the client whether there are risks that should be defined and assessed in advance of trying to "win" the appeal.[7]

The question for the appellate lawyer representing an inmate on appeal is whether it is necessary to take the time to visit the client at his or her dwelling place—i.e., must an appellate lawyer visit the client at the prison house? Is there something that compels making a prison visit to meet a client face-to-face if one's appellate work is largely independent of the client's identity? Should the answers to these questions be any different when it is a law school appellate criminal clinic that represents an indigent inmate on appeal?

II. Is It Possible to Maintain an Appellate Practice in a Cloister?

The technical activities of appellate counsel may be accomplished in a cloister. No doubt, it *is possible* for appointed appellate counsel to fulfill one's legal obligations to a client

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[7] An appellate lawyer must make his client aware that a "win" on appeal may sometimes result in more severe punishment upon reconviction after retrial. At one time, it appeared otherwise:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

North Carolina v. Pearce, 395 U.S. 711, 725 (1969); *accord* Blackledge v. Perry, 417 U.S. 21, 28 (1974) ("A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."). It has become increasingly apparent over the last several decades that neither the Due Process Clause nor the Double Jeopardy Clause provides a basis for lightly assuming that a client will enjoy constitutional protection against increased punishment if reconvicted following a successful appeal. *See generally* Sattazahn v. Pennsylvania, 537 U.S. 101 (2003); Monge v. California, 524 U.S. 721 (1998); Alabama v. Smith, 490 U.S. 794 (1989); Texas v. McCullough, 475 U.S. 134 (1986); Wasman v. United States, 468 U.S. 559 (1984).

without ever meeting the client face-to-face in prison. Experienced appellate lawyers may prefer not to expend valuable time traveling to prison to talk to a client whose views cannot change what truly matters on appeal—to wit, the array of colorable appellate claims that are preserved in and supported by the cold record.[8]

More than a few appellate lawyers think that an in-person meeting with an incarcerated client is neither mandated by professional ethics nor necessitated by pragmatic considerations relating to the appellate process. In light of the very

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[8] This is not all that "truly matters on appeal." Lawyers tend to restrict their focus to what will matter to the reviewing court, putatively their own important audience because of its power to reverse the judgment under review. What matters to the court is, in turn, what matters to lawyers in their work. What often does not matter to lawyers is asking whether there is anything more that matters to the appellate client. There is more that matters for most clients. Many clients simply would like their attorneys not to look past them. Many clients have an empirical basis for distrusting appointed lawyers by the time that they have been convicted and sentenced for a crime. As most criminal appeals are legally unsuccessful, appellate lawyers would do well to define success more broadly and to place a value on not becoming the latest legal representative to make critical decisions for the client without explaining them and listening to the client's story. In his article, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, Clark D. Cunningham provides an invaluable tale of a case in which he and his students "translated" a trial client's story into a search and seizure strategy, with the result that "our translations of [client] Johnson's story erased his racial identity." Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1376 (1992). When the state dismissed the case, "[i]t might have been a great experience for the students, but it certainly was not for Dujon Johnson." *Id.* at 1329. Johnson made clear that his identity had been sacrificed in the case and that his lawyers had been accessories to the sacrifice. He wrote,

> [M]y deepest regret [is] that the judge assumed he knew how I was as an individual, and on this assumption, he judged me on what he believed and not on what was said by me, my counsel, or even on what he saw (other than my race). *To be voiceless was the greatest pain of all.* What struck me most about the judge is that *he seemed so compassionate* [to others in other cases I observed] in the 10 months or so that I came to the courthouse waiting for hearing after hearing to be rescheduled. *I never saw this compassion.* I never received the "I have been there before, I can relate" talks that he frequently gave to those who came before him.

Id. at 1387 (emphasis added).

nature of lawyering at the appellate level, it is not difficult to construct a pragmatic justification for concentrating one's energies on the immanent aspects of appellate practice: studying the record, researching the law, selecting the issues, writing the brief, and presenting oral argument. The manifest necessity in criminal *trial* practice for attorney/client communication and shared decision-making is far from manifest in criminal appellate practice.[9] Where the trial attorney works in the present tense with live witnesses, the appellate attorney works in the past tense with artifacts from the trial, which is known as the "dead record."

It is not difficult to see why appellate attorneys perceive little need for direct personal contact with appellate clients and why many prefer written contact with clients. The written mode is particularly inviting for the appellate lawyer, who is by definition a literate professional whose bread and butter is effective expression in formal written prose. An obvious advantage of writing is that it is "displaced speech": the speaker need not ever be in the same place at the same time as the person being addressed.[10] Writing is unilateral communica-

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[9] In the trial context, a criminal defendant is an active presence with some decisional authority that he shares with his attorney and some that altogether trumps that of his attorney. The Constitution describes a criminal defense attorney to be the accused's "assistant." Faretta v. California, 422 U.S. 806, 818-21 (1975). The Sixth Amendment makes guarantees to a criminal defendant personally, including the right to confront his accusers at trial and to be present at all critical stages of the prosecution. *Id.* at 819-20; Illinois v. Allen, 397 U.S. 337, 338 (1970). Certain constitutional decisions may not be delegated to an attorney but may only be made by the accused: e.g., entry of a plea, acceptance of a plea bargain, waiving the right to a jury trial, choosing to testify at trial, and choosing to appeal. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.2 (1993).

[10] Linguists use terms such as "displaced" and "desituated" to describe communication between persons who are not simultaneously present during the sending and receiving of their messages. Charles Hockett writes of displacement in terms of the references made within a communication: "A message is *displaced* to the extent that the key features in its antecedents and consequences are removed from the time and place of transmission." CHARLES F. HOCKETT, A COURSE IN MODERN LINGUISTICS 579 (1958). The difference between messages in writing and spoken messages reflects a second degree of displacement. Chafe writes:

> Copresence and interaction together define a property that can be called

tion until such time as the audience writes back.[11]

The Supreme Court has declared that the roles of trial and appellate counsel in criminal cases differ markedly. A criminal defendant is an active player in his trial case. A trial attorney must work with trial clients in order to ensure that the client makes informed decisions in the exercise of his constitutional rights. The same kind of close working relationship between counsel and client is not required, either constitutionally or otherwise, on appeal.

The Supreme Court views the constitutional role of counsel in the trial and appellate contexts as different because the process of trial and appeal are different for historical, formal, and functional reasons. The very concept of an appeal as of right in criminal cases is not much over a century old.[12] The

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situatedness—the closeness language has to the immediate physical and social situation in which it is produced and received. The nature of conversational language and conversational consciousness is dependent on their situatedness. Written language is usually *desituated*, the environment and circumstances of its production and reception having minimal influence on the language and consciousness itself.

WALLACE CHAFE, DISCOURSE, CONSCIOUSNESS, AND TIME: THE FLOW AND DISPLACEMENT OF CONSCIOUS EXPERIENCE IN SPEAKING AND WRITING 44-45 (1994).

[11] One cannot presume that an inmate will write back if he wants to do so and that receiving no reply signifies assent to a lawyer's letter. While some inmates are impressively literate and prolific correspondence, many inmates are not. As the federally mandated "prisoner's representative" on an Institutional Review Board at the University of Connecticut Health Center, I am continually reminded that the federal law on human subjects research classifies prisoners as a "vulnerable population." *See* 45 C.F.R. § 46.301 *et seq.* (2000). ROBERT J. LEVINE, ETHICS AND REGULATION OF CLINICAL RESEARCH 277-95 (2d ed. 1986). Informed Consent Forms must be in "language which is understandable to the subject population," 45 C.F.R. § 46.305(a)(5), which for my IRB means a fifth grade reading level. Because incarceration itself is seen to undermine an inmate's capacity to make a voluntary choice, some otherwise licit biomedical or behavioral research is categorically disallowed in prisons and other, permissible research requires special IRB review that includes a process for obtaining "informed consent" that is uncoerced despite the prison setting. 45 C.F.R. § 46.302; *see also* Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1046 (1981-82) (concluding that lawyers, like doctors, prefer not to engage their clients in disputes over the propriety of their marching orders and the ultimate authority to give orders).

[12] The Court in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), pointed out that "the right of appeal itself is of relatively recent origin."

Sixth Amendment provides a formal basis for requiring counsel to help an accused in his defense against the government's criminal prosecution, i.e., his defense at trial, but the Sixth Amendment is not formally applicable to the process of appeal. On appeal, the role of counsel is functionally transformed: now the defense, not the State, is the party initiating the legal action, i.e., the appeal.[13] An indigent criminal defendant on an appeal "of right" is entitled to an appointed attorney as a matter of fairness,[14] not because the right to appellate counsel ranks as a constitutional "necessity" by the measure used by the Supreme Court in the trial context.[15]

Id. at 159. The *Martinez* Court noted that an appeal as of right in criminal cases did not exist at common law and that the trend toward its recognition in federal and state courts only began in the latter part of the Nineteenth Century. *Id.*

[13] The Supreme Court in *Ross v. Moffitt,* 417 U.S. 600 (1974), wrote that:

> [I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.

Id. at 610-11.

[14] Douglas v. California, 372 U.S. 353, 355-57 (1963); Halbert v. Michigan, 125 S. Ct. 2582, 2593-94 (2005).

[15] The *Gideon* Court declared that for trial purposes, "lawyers in criminal courts are necessities, not luxuries." Gideon v. Wainwright, 372 U.S. 335, 344 (1963). While the nature of the appellate process makes the technical nature of the need for counsel different at trial and appeal, the Supreme Court has recognized that the technical nature of the appellate process is beyond the ken of lay persons:

> The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over. As we stated in *Evitts v. Lucey*:
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> > In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appel-

Against this legal backdrop it is certainly defensible for appellate lawyers to forgo direct client contact. Seasoned appellate practitioners are ever aware that their work centers around the already established record, not on what a client has to say about matters not reflected in the record. It appears almost wasteful to spend a day going to prison when one might better attend to the appeal by remaining in one's law office with the trial transcripts, near a real or on-line law library, and poised by one's computer, typewriter or quill pen preparing to compose the brief!

III. Should a Law School Appellate Clinic Stay in Its Cloister or Visit Its Clients in Prison?

I confess that I do not agree with those who find it ethically and pragmatically defensible for an appellate attorney not to visit a client in prison. A face-to-face meeting is essential to discuss the terms of the lawyer's representation, the nature of the appeal process and its possible risks and benefits for the client,[16] and simply for the lawyer and client to recognize each other. The point of this paper, however, is not to pick a quarrel with those seasoned appellate criminal lawyers whose professional *modus vivendi* places no premium on actually meeting with incarcerated clients. Instead, the point of this paper is that any such justification is not sustainable in the setting of a law school clinical program. I propose that the law school clinic's educational mission transforms the discourse, removing the "cloister option."

Whether to visit an appellate client in prison is not merely a question that clinical teachers may ask and answer in our role as legal professionals. Rather it is also a question to be asked and answered by us a second time in our role as teachers with a special obligation to our students acting as co-coun-

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> lant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake.

Penson v. Ohio, 488 U.S. 75, 85 (1988) (internal citations omitted) (quoting Evitts v. Lucey, 469 U.S. 387, 396 (1985)).

[16] *See supra* note 7.

sel, an obligation to make the case experience valuable educationally. Further, I would argue that there is a special obligation to an incarcerated client who is represented by students under clinical supervision.[17]

Law school appellate criminal defense clinics meld two worlds, professional lawyering and professional education. The lead *dramatis personae* in appellate practice are the lawyers for the defendant and the government and the judges on the reviewing court. When appellate practice is conducted in the law school setting, the lawyers for the defendant have dual identities and an added purpose: while they serve as lawyers for the defendant/appellant, they are also teachers and students. The teacher/student relationship implies a promise to optimize the value of the case for the student educationally, not just to deliver on the clinic's professional promise to optimize the client's odds of legal success.[18]

Long-distance client counseling is peculiarly inappropriate in the setting of a law school appellate defense clinic. An in-person visit to meet a client in prison is altogether necessary where the clinic plans to assign law students to compose the client's appellate brief and present oral argument in court. Clinical supervisors and law students need not adopt an efficiency model of professional practice. Unlike private practitioners and public defenders, faculty and students in law school clinics are expected to be generous with their time and effort in every case. A clinic's docket should be small, and a student's case assignments should not be numerous. In a clinic there is no "next case" that is more important than the one at hand. The order of the day is conscious reflection throughout the process, not the production of an appellate brief with the efficiency of a seasoned pro. It must be expected that work production will be deliberate and perhaps even slow in an

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[17] The prison visit is all-but-necessary in order to procure truly informed consent from an inmate to representation by a law student on appeal. *See supra* note 11.

[18] There is, of course, a possible conflict of interest in the clinical supervisory role if the supervising attorney allows his or her duty of loyalty to the client to be compromised by the supervisor's educational obligations to students.

appellate criminal defense clinic: a premium is put on collaboration among students and with faculty, frequent consultation and review, and on personal and collective reflection throughout the appellate process. The purpose of a law school clinic is professional *and* educational. It is a multifunctional model for the practice of law, one that centers on the interests of the client whose case is on appeal *and* on the educational value of the process for the students assigned to the case. In sum, I believe that a clinical supervisor should place an ethical, legal, and *educational* premium on the role of trips to prison with students to meet and consult with their appellate clients.

IV. Confronting Students With The Tension Between an Appellate Attorney's Decisional Authority and the Need to Accord the Client "That Respect for the Individual That is the Lifeblood of the Law"[19]

Our first several classes in the fall semester at the UCONN Criminal Appellate Clinic center on the nature of the appellate process in the American legal system, the function of appellate attorneys in that process, and the client's role in the appellate process. The springboard for our class discussions is *Jones v. Barnes*, where the Supreme Court held that an appellate client does not have a *constitutional right* to direct issue selection, briefing, and strategy at oral argument for his own appeal.[20] An appellate attorney is obliged to perform competently in the technical appellate process, but *is not obliged* to be subservient to the client. At our very first clinic classes, we discuss what implications *Jones v. Barnes* has for our Clinic's representation of appellate clients.[21] Should we tell our cli-

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[19] Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring). Justice Brennan coined this phrase in his concurrence, as he stated "shackling and gagging a defendant . . . offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law." *Id.*

[20] Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

[21] Our appellate clinic primarily handles cases on direct appeal for criminal defendants whose indigence otherwise qualifies them for representation by the Connecticut Office of the Public Defender or by a special public defender. *E.g.*, State v. Hammond, 604 A.2d 793 (Conn. 1992) (remand for consideration whether

ents that we have the power to supersede their views on issue selection, briefing, and oral argument? Should we promise to entertain their views on the handling of the appeal but inform them that legally we have the final say? The class discussion invariably moves to sources of authority other than the U.S. Constitution as we search for guidance in defining the attorney/client relationship on appeal. We look at the Rules of Professional Conduct and various independent state law sources (statutes, rules of court, the state constitution and decisional law). It becomes apparent that there is no source that directly mandates the terms of the attorney/client relationship on appeal. Aside from promising to render "effective assistance of counsel," what, then, are the promises that the clinic will make to its appellate clients?

At some point in the first or second class, always, my colleague, Todd Fernow,[22] or I will interrupt our own and the students' abstract declarations and try to anchor matters to an actual reality; the clinic's ultimate course of action in any given case may well be more a function of the client's individual identity than it will be a reflection of our general answers to the philosophical issues involved in deciding whether and how to share decisional authority over an appeal with clinic clients. This is the time for some storytelling, best enlivened by our taking turns role-playing as past clients. Tim or Todd becomes the inmate and the classroom becomes a jailhouse visiting room. The class responds in role as attorneys. Four of

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jury verdict was against the weight of the evidence where blood grouping and DNA results exculpated the defendant). Our clinic also handles some habeas corpus petitions both in the trial and appellate courts. *E.g.*, Johnson v. Comm'r, 786 A.2d 1091 (Conn. 2002) (parole board improperly applied new parole eligibility law retrospectively); Phillips v. Warden, 595 A.2d 1356 (Conn. 1991) (ineffective assistance of counsel based on violation of duty of loyalty when lawyer tried case for client following his own conviction of murder).

[22] Professor Fernow has taught in the Appellate Clinic at UCONN since 1983. I have taught at UCONN since 1987. We have had other colleagues in the program who have enlivened and enriched it, most notably its founder, Professor Michael R. Sheldon (now a Connecticut Superior Court judge), and several appellate specialists from the Connecticut Public Defender's Office, including Richard Emanuel, Joette Katz (now a Connecticut Supreme Court justice), and the late Jerrold H. Barnett.

the scenarios that we have used follow:

Client One: This inmate asks appellate attorney at first meeting in jail, "Do you think I am guilty? I want an attorney who believes in my innocence." The client presses for an oath of loyalty and is not satisfied with lawyerly tergiversations about the nature of reversible error, the irrelevancy of actual innocence on appeal, the limits of the record, etc.

Client Two: This inmate speaks in disjointed blurbs, doesn't think students look like attorneys . . . too young . . . doesn't want attorneys who are not sure they can win . . . wants the clinic to guarantee victory.

"Are you as good as _____ [name of his attorney on his successful first appeal]? He won but he ain't there for me now. This time I want to get out of jail."

"I mean, this time I get a 'walk' — no more trial, not this time." [Inmate had prevailed on his first appeal, but remedy was new trial, has been reconvicted.]

Added features for spice: Client has I.Q. of 60. He is 40 years old. His sentence is life without possibility of parole. Client appears to hear half of what is said half of the time, reacts to communications affectively not semantically, has no patience for abstract talk, and assesses everything viscerally, not cerebrally.

Client Three: (Inspiration: "Froggy Barnes")[23]

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[23] *Jones*, 463 U.S. at 747.

Inmate serving a forty-year sentence for murder is agreeable in manner, but has a punch list of concerns/demands:

Has a lengthy list of issues to include in appellate brief. Wants final say on what issue selection. Was "railroaded" by trial attorney and not permitted to control his defense. Wanted to testify but his attorney stopped him. Won't be pushed around again by a lawyer.

Insists upon seeing brief before it is filed.

Wants copy of transcript (2,000 pages long). Was told by public defender's office that it would charge 10 cents a page. Client penniless. Will the clinic give him a free copy of the transcript?

Client Four: After talking with appellate client and studying trial record, appellate attorney develops conviction that client is probably telling the truth when he insists that he is not factually guilty of the crime of which he was convicted. Client would like attorney to pursue claim of factual innocence in any and every venue available under Connecticut law "like Emanuel did for this dude, Miller."[24] Will the clinic do that for him?

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[24] The inmate is referring to Larry Miller, an inmate whose appellate attorney, Richard Emanuel, came to believe in his innocence during the course of Miller's unsuccessful appeal and then spent over a decade developing evidence that ultimately led to Miller's successful habeas corpus petition based on a "free-standing claim of actual innocence." Miller v. Comm'r, 700 A.2d 1108, 1110 (Conn. 1997).

V. Preparing for and Making the Prison Visit to See an Appellate Client

Before visiting an appellate client in prison, clinic attorneys will have access to both public and private information that they should review without delay. Supervisor and students should review any correspondence with the client, the transcripts if available, the documents received from the trial court clerk's file, and the statutory and case law relating to the offenses adjudicated at trial.[25] The first meeting with one's client is an interview in which counsel is both an interviewer and interviewee. The client will judge his appellate lawyers adversely if they flunk the client's interview. Doing one's homework, "making book" on the case and on the identity of the client, is critical to ensure that the prison meeting will commence a professional relationship with the client that will be professionally and communicatively successful. As the client also has a dual role as interviewer and interviewee, it is advisable to give the client notice of counsel's intent to visit to discuss the client's appeal. Whether the notice is by letter, by phone, or by leaving a message with the inmate's prison counselor, the notice is a courtesy that is appreciated by most clients as it signals respect for the client and puts the client in a position to come to the meeting prepared to ask questions and to share any information and documents that he believes to be relevant to his case.[26]

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[25] It is unnecessary to read a transcript fully before making the visit to prison to meet with one's client. It is advantageous, though, to "make book" on the client's case and on his identity with the materials available before going to prison for a face-to-face meeting. Student attorneys should at least read the transcripts of sentencing (which often include the client's perspective on the trial when accorded the right of allocution) and the probation report received by the court for sentencing purposes (which includes sections on "victim's attitude," the "offender's personal history," his criminal history, the nature of the current convictions, and a report on the probation officer's interview with the client, if he chose to speak). I also recommend reading the summations of counsel to get a provisional sense of the factual themes in the case.

[26] For the clinical supervisor, the question arises whether to assign the student to arrange the prison meeting and notify the client or whether the supervisor might better relieve the student of that particular experience. I have followed

In planning for a prison visit, I find that students (and I) have an easier time defining "what" the meeting with the client should entail rather than defining "how" we can expect to accomplish our mission. The harder task is preparing to communicate with a person whose identity, capacities, and own agenda may become apparent only as the prison visit is taking place. With that in mind, here is a list of subjects important to a clinic's agenda for a prison meeting with a new appellate client:

1. *Introductions: Personal and Professional Identification.*

   Identify individual attorneys, explain the nature of the appellate clinic program, explain how the clinic was appointed to represent the client on appeal. Explain the purposes of this meeting, including a statement of interest in hearing client's agenda. Establish the scope of the meeting; it is not a time for the lawyer or client to feel he/she must "speak now or forever hold his/her peace." Indicate that there will be opportunity for follow-up communications over the course of appeal if the client decides later that he is comfortable with clinic's representation.

2. *Written retainer agreement forms.*

   Even where the clinic has been appointed as appellate counsel already, the clinic should consider use of an attorney/client agreement form that sets forth and limits the terms of the representation. Client and counsel may choose to review the form and sign it by the end of meeting. Sometimes it is wiser to use the meeting to establish

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both routes on the theory that everything about the prison context is grist for the mill in the student's professional and educational experience. Sometimes the sheer difficulty of getting word to an inmate and the variable helpfulness of counselors and other prison authorities may impress a student with the reality of incarceration as a removal from society at large. But a premium should be put on actually visiting the client in prison, sooner rather than later, not on exploring the myriad.

a foundation for client's making an informed choice regarding representation and to put off signing the form until a later time.

3. *Appellate Education of Client*: Matters upon which to educate client as effectively as possible (understanding that no one masters the cardinal concepts of appellate work in one sitting).
   a) What is an appeal?
   b) What is the appellate record? Can the record be augmented with additional evidence? Why not?
   c) Who will pay for the trial transcripts? Can the client get a copy of the transcripts? Must he pay the clinic for a copy?
   d) The concept of preserved error. When, if ever, may claims be made on appeal that trial counsel failed to preserve for review?
   e) What is reversible error?
   f) What kinds of claims and remedies can be pursued on appeal? What kinds may not be?
   g) Will the client be expected to play a role in decision-making on appeal? Will the clinic's lawyers share their decision-making authority with the client? Will the clinic consider the client's input or is he "an extra wheel" in the process?
   h) What is a brief? Who will write it? Will the client get to see it? Before it is filed? May the client file his own supplemental brief?
   i) What role will student attorneys play in the client's appeal? How have reviewing courts received the work of student attorneys in the past? What is the role of the supervising attorney? Suppose the student attorney is not up to the task? Suppose the stakes are too high to entrust them to a beginner?
   j) What other avenues of post-conviction challenge to the conviction or sentence exist? Will the clinic represent or advise the client on other post-conviction options? Must the appeal be decided before pursuing

other post-convictions options?

k) How long will the appeals process take? What happens if the client loses his first appeal as of right? Will the clinic handle discretionary appeals thereafter in state or federal court?

l) How do appeals differ from trials in purpose and procedure? How does the work of an appellate attorney differ from that of a trial attorney? How do these differences impact upon the attorney/client relationship?

4. *Pyrrhic Victory Concerns: Assessing the Risks of Winning."*

As indicated earlier, a critical aspect of handling criminal appeals competently is issue selection that takes into account the possible adverse consequences of "winning" a given appellate challenge. The *Pearce/Perry* doctrine does not necessarily protect against more severe punishment following an appellate reversal.[27] Counsel will want to

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[27] At one time it was easier to discern whether there was a risk of increased punishment upon reconviction after a successful appeal because the Supreme Court had appeared to require that enhanced sentences be predicated on conduct occurring after the first sentencing. North Carolina v. Pearce, 395 U.S. 711, 726 (1969); *see also* Blackledge v. Perry, 417 U.S. 21, 25-27 (1974). In Connecticut, the *Pearce/Perry* doctrine was applied broadly for a while even after the Supreme Court had reduced its amplitude. *See* State v. Sutton, 498 A.2d 65, 74-75 (Conn. 1985). *But see* State v. Coleman, 700 A.2d 14 (Conn. 1997) (increase in sentence from thirty-five years to 110 years following successful withdrawal of guilty plea did not trigger *Pearce* protection). Connecticut's initial broad application of the *Pearce/Perry* doctrine was contrary the Supreme Court's narrowing of constitutional protection against increased punishment upon reconviction after appeal. *See* Wasman v. United States, 468 U.S. 559 (1984) (presumption of vindictiveness overcome where judge relied on intervening conviction on charges that had been pending but were discounted by court at first sentencing); Texas v. McCullough, 475 U.S. 134 (1986) (presumption of vindictiveness overcome where judge imposed a fifty year sentence at second trial after presiding over first trial at which the jury imposed a twenty year sentence because of the judge's articulation of objective information supporting an increased sentence); Alabama v. Smith, 490 U.S. 794 (1989) (presumption of vindictiveness does not apply to greater sentence imposed after appeal of a guilty plea); Monge v. California, 524 U.S. 721 (1998)

communicate the need to discover any factors that might subject the client to increased punishment following reversal of the conviction on appeal. This concern alone justifies going to prison to establish a trusting attorney/client working relationship so that clients will disclose to counsel the kinds of information needed to assess the risks a client faces upon retrial after an appellate reversal.[28]

VI. Prison Conversations With Students And Clients

Participation in a professional visit with a client in prison is a valuable part of a student attorney's clinical experience,[29]

(double jeopardy does not bar a second non-capital sentencing hearing following appellate determination that evidence at first hearing was insufficient to prove "three strikes" liability); Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (no double jeopardy bar to imposition of death penalty reconviction where defendant successfully appealed the first trial conviction at which he received a life sentence but was not "acquitted" of the death penalty).

[28] Close analysis of the individual case and exploration of the client's precise circumstances are necessary in order to advise an appellate client on whether and how to perfect his appellate rights. Counsel needs to know about "skeletons in the client's closet" that a second sentencing authority could discover and use to enhance punishment. In our appellate clinic, we spend considerable time discussing these issues among ourselves and with our clients. When we learn that a client is at risk of increased punishment after appeal, we have sometimes chosen to pursue only appellate claims of error that do not "wipe the slate clean" and subject the client to a new trial, re-conviction, and a more severe sentence (e.g., insufficiency of evidence, statute of limitations, double jeopardy, speedy trial).

[29] By clinical experience, I mean both the student's legal and educational professional experience in handling the case and also the personal dimensions of the experience for the student and client. Law students visiting prisoners may choose only to look for and find "just the facts" they believe that they will need in their work as legal technicians. Those who look for more may see more than they bargained for—a client in prison whose story and whose aspect as a fellow mortal make it hard to keep a professional distance. At a personal level, lawyers may respond to the client and the prison with feelings that run the gamut from shock and revulsion to a sense of identification and poignancy. Most law students I have worked begin by trying to limit themselves to a safely detached professional persona. Understandably, students, at least initially, may hesitate to speak openly about what intrigues, disturbs, revolts, and impresses them about the prison visit and their clients. This is not the place for an extended discussion of the value and limitations of disengaged observation, other than to remark that in the clinical setting, such detachment may deprive students and supervisors of the kind of honesty needed to address the most disturbing and interesting aspects of our experience. *See generally* Ruth Behar, The Vulnerable Observer: Anthro-

whether the student is lead interviewer or not. For most students, the visit is their first to a prison and first to meet a "convicted felon." They make the visit in the garb of a professional lawyer but invariably find the experience transcends merely doing something that affirms their budding status as legal professionals. In the last year, I have asked my Appellate Clinic students to put in writing for me their impressions after visits we have made to see inmates in prison. Their input has been of great value in my supervision of their case work and in my composing this essay on prison visitation. I savor the opportunity that the rides to and from prison provide for speaking with students about their expectations of the visit and about their thoughts and feelings after the visit. Often I learn something invaluable about a student that is important to the case and to me as a clinical supervisor.[30]

My interest in prison conversations with clients pre-dates my career as a clinical teacher. My own experiences as a criminal clinic student inspired my belief that it is valuable to visit appellate clients in prison and my fascination with the communicative challenge of meeting effectively with a person who is subject to the difficulties of prison life. I offer what follows to open discussion on some of the challenges one faces in communicating with actual inmates in prison.

One summer's day in 1982, after my first year of law school, as part of my summer internship with the criminal clinic in which I now teach, I was sent to visit four inmates

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POLOGY THAT BREAKS YOUR HEART chs. 1, 6 (Deb Chasman ed., 1996).

[30] Time spent in a car driving to and from a prison visit gives students the chance to express thoughts and feelings about their cases, clients, social justice, their ambitions in the law, and their lives that they might otherwise not express, at least in my presence. Travel itself may be a catalyst to greater expressiveness. It may help that we are away from the law school, keeping one another company as I drive, perhaps stopping at a diner to talk more after the visit. Visiting a client in prison interrupts "business as usual," effectively freeing us to hold conversations less hurried, less guarded, and more revelatory than when we are "in gear" back on campus. Students marvel at many aspects of the prison visit. Perceptions that are merely self-evident in the abstract are altogether different when rooted in actual observations of a prisoner and prison: one student said "it blew my mind" that the inmate we visited was less than twice the student's age but had been in jail for almost as long as "my entire life."

who had corresponded with the clinic. Their letters of inquiry had a common thread: the hope that imprisonment was a reality built on wrongs done to them that might yet be rectified. Each was in an existential boat, capsized and looking to be righted by legal action. The letters assumed that criminal cases, even cases ended long ago, can always be re-opened, then handled differently the second time around so as to accomplish the kind of just results that "went missing" the first time.

Three of the four inmates had been sentenced for sexual assault and one for armed robbery. Only one of the four had stood trial; he had lost his appeal and was serving time for sexual assault. The other three inmates had been convicted by their own pleas of guilty, now regretted. All four were housed in Connecticut's maximum security prison of that era. The purpose of my visits was to gather more information about each inmate's putative "case" and then to report back to a staff attorney at the clinic. The clinic would later advise each inmate on any colorable challenges to his incarceration that might be brought and on the strategic advisability of any such challenges, given the counterintuitive reality that prevailing in a post-conviction action may ultimately harm an inmate's liberty interests more than taking no action at all.

Sent on a fact-finding mission and with some confidence that I would find prison interviews interesting, if not fascinating, I met with all four inmates in the course of a full day at the prison. I listened, regarded each individual, avoided giving advice, made no predictions, and promised only to take what I heard back to my supervisor at the clinic. This mode worked with three inmates; without any special prompting, each was voluble as soon as I made it clear that I was there to be an audience for the story behind his incarceration.

Naturally, the plot of each inmate's story varied: Time, place, and action, the concrete details of the criminal offenses, differed. The *dramatis personae*—prosecutors, defense counsel, judges, witnesses, and family history—differed for each tale. Just as importantly, the tales differed because each inmate had an individual style and manner as narrator of the part in

his life story that had led him to prison. Each had a perception of what landed him in jail, with each reflecting some level of self-examination mixed in with some criticism of the legal and social system. A person telling his life story, or a chapter or two from it, to another person during a prison visit is not worried about being original or having a style that might capture a broader audience's interest. Thankfully, most inmates take their incarceration and their suffering seriously and, thus, are ready to talk. I took notes on their stories. I asked questions sparingly because each was voluble. My presence in the jail to serve as their audience and my identity as a law student affiliated with a criminal clinic were more than enough to carry my side of the dialogue most of the time.[31] I was a first year law student with the strength that accompanies a beginner; I was not impatient because I did not suffer under the illusion that I knew enough to try to enforce efficiency on my conversations with human beings serving time in prison for serious criminal offenses.

But one of the four inmates could not tell me his own story. He spoke haltingly, seemed unsure why he was in prison, and was unsure quite why he had written the clinic. He appeared to be altogether confused. He stood out in the prison setting because he was not able even to assert that he had been wronged. By contrast, the other three inmates had a strong grip on their own life stories and their putative cases. Their stories were not necessarily tenable, but they were *tellable,* needing only an audience. That, I could be. The fourth inmate's inarticulateness and inner confusion left him without a voice to make himself heard. It left me unable to fulfill my immediate task as an audience, which was to listen to him and give him recognition. I could only try to respect him, but I could not convert what I learned about him into useful legal

[31] But even a voluble story-teller sometimes needs an audience-editor to probe for more detail or to give a nudge to move the story along. I found that even a neophyte legal interviewer, however patient and tentative, may safely venture an occasional prod to keep the story teller on track. An occasional note of skepticism also seemed to help and did not seem to elicit resentment.

information.

In the course of visiting inmates with my students in an appellate clinic, I have faced a range of intellectual, emotional, and expressive competences in our clinical clients. Some clients are thrilled to be visited and decide quickly that the clinic's services are more than acceptable to them. Some clients appreciate being visited but want to test us further to determine whether we meet their standards for an appellate lawyer.[32] Only once has the clinic failed to reach an agreement with a prospective client on appellate representation—that in the case of the inmate who wanted a guarantee of victory that would lead to his immediate release, not retrial.

I cannot here propose a unified field theory for counseling appellate clients. However, I can give a clue on what has been of inestimable value as a guide in trying to communicate with inmates. An inmate who was something of a "Radar O'Reilly"[33] at the maximum security prison once told a student and me, "Just remember one thing. All of us in here has got our self-respects [sic]." I have found that inmates do have a very human need to be recognized and respected. That does not mean that lawyers need remain silent when an inmate is wrong-headed about the law. It does not mean that one is a supplicant. But exhibiting respect for the personhood of appellate clients by making visits to meet them in prison has consistently proven to be the best way of beginning to establish a respectful and effective attorney/client arrangement with our appellate clinic clients.

VII. Conclusion

Though it may well be possible to provide "effective assistance of counsel" to an appellate criminal client without visiting the prison house, that does not make it ethical. Neither

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[32] When visiting one client to discuss an upcoming oral argument before a three judge panel, the client turned to the student on the case and asked, "What are you going to *drill* in their heads?"

[33] I refer to the character played by Gary Burghoff on the classic TV show *MASH*.

does it make it strategically wise not to visit. This article has reviewed some ethical and strategic reasons militating in favor of making it a professional practice to visit incarcerated appellate clients where they live, i.e., in prison, instead of relying exclusively on written correspondence with them. However, the primary focus of the article is on the overriding value of prison visits with clients who are represented on appeal by law school clinics in which law students will engage in issue selection, brief writing, and oral argument on the client's behalf. That a licensed professional appointed to represent a prisoner on appeal may (perhaps) be able to meet his obligations to the client without meeting the client begs the question whether it is legally, ethically, and educationally appropriate for professors and law students in a law school clinic to represent clients without meeting them in person. I believe that making a visit to meet with an client is an invaluable part of a law school appellate clinical curriculum.

TEACHING EFFECTIVE ORAL ARGUMENT SKILLS: FORGET ABOUT THE DRAMA COACH

Michael Vitiello[*]

I. INTRODUCTION

Over twenty years ago, questions about lawyers' competence led the American Bar Association (ABA) to study the adequacy of skills training in law schools.[1] Along with a focus on skills generally, the ABA appointed a committee to study whether law schools were successfully teaching appellate advocacy skills.[2] The ABA eventually agreed with the committee report, which was critical of both law school curricular offerings in appellate advocacy and traditional moot court competitions.[3]

A 1984 ABA survey indicated that a significant majority of all law schools had moot court programs that failed to teach

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[1] *See* ROGER C. CRAMTON, A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS iii (1979) (stating that Chief Justice Warren E. Burger's criticism of the competency of lawyers led, in part, to the creation of an ABA task force that studied practical skills training in American law schools) [hereinafter CRAMTON].

[2] *See* Comm. on Appellate Skills Training, *Appellate Litigation Skills Training: The Role of the Law Schools*, 54 U. CIN. L. REV. 129, 133-34 (1985) [hereinafter Committee].

[3] *See id.*

essential advocacy skills.[4] I have found no similar data focusing on appellate advocacy and moot court courses since the ABA report. In light of that, I asked my research assistants to survey law schools around the country to assess whether the law schools have upgraded their advocacy training.[5] The survey found that law schools have improved their advocacy programs.[6] However, this raises questions of whether law schools have gone far enough to address the concerns raised by the ABA report.

The conclusion that law schools have not gone far enough in upgrading their oral advocacy training finds support in the continued criticism of student advocate and practicing lawyers' oral advocacy skills. Contemporary critics of moot court programs believe the programs reward the wrong skills—they are correct. The most significant lingering criticism of oral arguments is that attorneys fail to appreciate the primary purpose of their fifteen or twenty minutes before the court.[7] Some commentators speculate that courts have limited oral argument, both in length and availability, because judges find the quality of those arguments poor.[8]

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[4] *See id.* at 141.

[5] *See infra* App. A (reporting the results of an informal survey of web sites and interviews with appellate advocacy and legal writing faculty from forty-four law schools).

[6] *See infra* App. B.

[7] *See* Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569 (1999) (discussing the importance of oral advocacy in addressing the judges' questions and concerns); William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1021-1022 (1983) (emphasizing the ways in which oral argument assists the court); *see also* Frederick Bernays Wiener, *Oral Advocacy* 62 HARV. L. REV. 56, 58 (1948) (arguing that cases are won or lost on oral argument).

[8] *See* DAVID C. FREDERICK, THE ART OF ORAL ADVOCACY 2 (2003) (arguing that if the Supreme Court and courts of appeals were to further limit "the availability of oral argument, a principal reason would be long-expressed disappointment by judges and justices with the quality of oral advocacy."). *But see* Mark R. Kravitz, *Words to the Wise*, 5 J. APP. PRAC. & PROCESS 534, 546 (2003) (arguing that "while lawyers certainly bear responsibility for the quality of their appellate advocacy, there is a certain circularity in such arguments. For as judges reduce the number of cases they set for argument, they also necessarily reduce the opportunities for lawyers to hone their skills and become better oral advocates.").

The fact that law schools have increased resources devoted to advocacy training begs the question why we still lack qualified oral advocates. That is the central question that this article explores. Absent empirical data that explain the poor state of oral advocacy, I rely on thirty years of experience as a law professor, as an advocate, and as a coach of numerous moot court teams and director of two different moot court-appellate advocacy programs to explore this question.[9]

First, while law schools have paid greater attention to advocacy training over the past twenty years, we still have a long way to go. Too many programs are still the province of inexperienced professors.[10] Students have too few opportunities to give oral arguments, and involvement in advocacy is typically not required beyond the first year legal writing program.[11] Second, I suspect that many programs still do not teach the "right stuff." Instead, student advocates treat oral argument as a show.[12]

A less obvious explanation of poor advocacy skills is that law schools have become "kinder and gentler"[13] places over

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[9] Upon graduation from the University of Pennsylvania Law School, I clerked for the Honorable J. Sydney Hoffman, a judge on Pennsylvania's Superior Court, that state's intermediate appellate court. I began teaching at Loyola (New Orleans) Law School in 1977. While at Loyola, I handled a number of appeals and argued motions in federal and state trial courts. From 1986 until 1990, along with my colleague Patrick Hugg, I ran a moot court program designed to address many of the criticisms raised by the ABA report. In addition, I served as the faculty advisor to the National Moot Court team. Since beginning at McGeorge School of Law, I have coached a dozen National Appellate Advocacy Competition teams over a six year period, with half of them qualifying for the national competition rounds and five of them advancing at least as far as the semi-final round. In addition, for seven years, beginning in the mid-1990s, I designed and directed an appellate advocacy program. As with the program at Loyola, McGeorge's program addresses many of the concerns expressed in the ABA report.

[10] *See infra* App. B, tbl. 2 (summarizing the appellate advocacy experience of the faculty at some law schools within the survey).

[11] *See id.* tbl. 1 (indicating that most of the required courses that included instruction in oral advocacy were first-year legal writing classes).

[12] *See* HENRY D. GABRIEL & SIDNEY POWELL, FEDERAL APPELLATE PRACTICE: FIFTH CIRCUIT 7-7 (1994) (quoting Judge Henry Politz as stating that, "[t]he tone should be conversational and persuasive. Questions should be welcomed.").

[13] *See* Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DA-

the past thirty years. In many schools, the Socratic method is under attack.[14] Used rigorously, the Socratic method is an effective tool for teaching essential skills of oral advocacy, especially the ability to respond thoughtfully to questions.[15] Instead, many law professors, imbued with the notion that the Socratic method is bad for their students, conduct broad policy discussions where students' opinions are valued more than are carefully framed legal arguments.[16]

Section II of this article reviews the ABA's criticisms of moot court programs and summarizes our findings about the current state of moot court and appellate advocacy training. Section III discusses why, even though many law schools have upgraded their moot court courses, many judges and commentators still lament the relatively poor advocacy skills of lawyers appearing before them. Specifically, Section III discusses some of the myths about what constitutes effective oral advocacy. Further, it argues that the trend towards "kinder and gentler" legal education has led to a less rigorous use of the Socratic dialogue and that, when properly used, the Socratic method is an effective tool by which many lawyers learned the art of oral advocacy. By way of conclusion, Section IV offers some suggestions to improve the quality of oral advocacy training.

VIS L. REV. 1209, 1225-28 (2005) (discussing the methods that King Hall has used to promote its image of a kinder gentler law school).

[14] Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955 (2005); *see also* James R. Beattie Jr., *Socratic Ignorance: Once More Into the Cave*, 105 W. VA. L. REV. 471, 472 (2003) (giving an overview of the common attacks to the Socratic method); Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996) (giving an overview of the psychological negatives of the Socratic method).

[15] *See* Vitiello, *supra* note 14, at 987-88 (explaining that the Socratic method prepares students for future encounters with judges who will expect them to answer questions quickly and effectively while under pressure).

[16] *Id.* at 972-73 (describing new practices of schools that have abandoned the Socratic method).

II. Teaching Appellate Advocacy

During the 1980s, the ABA closely focused "on the lawyering skills or lack thereof of members of the bar, whether and to what extent these skills can be taught in law school, and how much of the limited resources of the law schools should be devoted to teaching them."[17] That focus produced a number of widely debated reports[18] and a continuing debate about the importance of teaching practical skills in law school.[19] Less widely reported was the ABA's consideration of appellate advocacy.[20]

In 1984, the Appellate Judges' Conference of the ABA assigned a committee the task of studying the special problems related to training appellate lawyers. The committee's report, issued in 1985, was highly critical of traditional moot court programs and competitions.[21]

Much of its report focused on appellate practice as a discrete sub-specialty. For example, the committee found that law schools failed to train lawyers in rules of appellate practice, rules such as those governing appeals, petitions for extraordinary relief, motions, settlement conferences, oral argument, rehearing, seeking review, and more.[22] The committee also focused on other special aspects of appellate litigation,

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[17] *See* Committee, *supra* note 2, at 130.

[18] *See id.* at 131; *see, e.g.*, Cramton, *supra* note 1; Section of Legal Educ. and Admissions to the Bar, American Bar Association, Legal Education and Professional Development: An Educational Continuum (1992) [hereinafter MacCrate Report].

[19] The February 2005 approval by the ABA House of Delegates of revised law school certification standards, including a strengthened skills requirement, shows that the ABA and, specifically, the Section on Legal Education and Admissions to the Bar have been focusing on improving skills training in law schools. A.B.A. House of Delegates Report 105B, at 2-3 (Feb. 2005) [hereinafter Delegates Report].

[20] *See* Committee, *supra* note 2, at 131.

[21] *Id.* at 137 ("[T]he appellate court as an institution and its relationship to the trial court is almost completely ignored in the normal law school curriculum."); *id.* at 141 ("It is clear that the traditional appellate advocacy program provides almost none of the fundamental or specialized knowledge or skills that are essential to an appellate litigator.").

[22] *Id.* at 138.

such as the need for attorneys to learn how to extract facts from a full appellate record[23] and to understand the standard of review on appeal.[24]

Beyond identifying the failure to teach these specialized skills, the report criticized moot court programs and competitions at a more general level. The report focused on the fact that upper level students or instructors with little appellate experience taught most moot court classes.[25] As the report concluded, "there must be training by a qualified instructor in the special skills of appellate brief writing and oral argument, particularly in working with a realistic appellate record."[26] While the report noted the addition of appellate litigation skills courses by some schools, such courses remained the exception.[27]

Although the report recorded the expansion of interscholastic moot court competitions, it concluded that these failed to teach meaningful skills for many of the same reasons that traditional moot court classes also failed to do so.[28] The report recommended that control be shifted from student moot court boards to experienced appellate instructors.[29] For example, the report insists that meeting the recommendations of the report "demands . . . an instructor who has the knowledge and specialized skills in all aspects of appellate litigation."[30] The report made its conclusion explicit: "[I]t should be clear that the prevailing practice of assigning third year students or

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[23] *See id.* at 139 (focusing on the necessity for appellate advocates to be able to sift through a trial record).

[24] *See id.* at 138 (discussing the important procedural rules that appellate advocates need to know including the proper standard of review).

[25] *See id.* at 149; *see also infra* note 31 and accompanying text.

[26] Committee, *supra* note 2, at 143.

[27] *See id.* at 143-44 (summarizing the results of a survey of law school courses in appellate advocacy).

[28] *See id.* at 145-46 (noting that moot court competitions, like appellate advocacy programs, suffer from inadequate instruction and limited application to professional appellate practice).

[29] *See id.* at 146 (suggesting ways that moot court programs could be restructured to provide better appellate experience, including the use of appellate litigators instead of students as instructors).

[30] *Id.* at 148.

new law school graduates the major responsibility to teach appellate advocacy programs or supervise moot court competitions is not desirable."[31]

Finally, the report identified the lack of adequate teaching material as another source of concern. For example, it observed that "the two most widely adopted books for use in this program were prepared by law students."[32] While the report recognized that some recently published material was better suited for upgraded appellate advocacy programs,[33] it also found lacking the availability of realistic appellate litigation problems.[34]

Significant changes have occurred in the more than twenty years since the ABA's adoption of the committee report. For example, many law schools have upgraded their legal writing programs.[35] To comply with ABA requirements, law schools now give legal writing instructors tenure or, at a minimum, long term contracts.[36] The result should be a more professional group of teachers, interested in making a career out of

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[31] *Id.* at 149. The report relied on a then-current survey indicating that "the large majority of instructors responsible for research and writing programs for first year students are recent law school graduates or third year law students." *Id.* (citing *Survey: Staffing of Legal Writing Programs in AALS Schools, 1982-1983* (Oct. 4, 1983) (conducted by Robert Cane, Director of Legal Writing, University of Puget Sound School of Law)).

[32] Committee, *supra* note 2, at 149.

[33] *Id.* at 149-50.

[34] *Id.* at 150-51.

[35] *See* Kristin Gerdy & Toni Berres-Paul, *2004 Survey Results*, 2004 ASS'N LEGAL WRITING DIRECTORS & LEGAL WRITING INST. 10, *available at* http://www.alwd.org/alwdresources/surveys/2004surveyresults.pdf (last visited Feb. 23, 2006); *see also* Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images*, 1 LEGAL WRITING 123, 129 (1991) (noting that seventy-five percent of responding schools "formally include moot court as part of the LRW program. . . . Eighty-three percent include an appellate brief argument." (citation omitted)).

[36] A.B.A., SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, STANDARDS: RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 405(d) (2005-2006) ("A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction . . . and (2) safeguard academic freedom."), *available at* http://www.abanet.org/legaled/standards/standards.html (last visited Feb. 23, 2006).

teaching.

Anecdotally, I am aware that some law schools have upgraded their moot court programs;[37] however, in preparing this article, my research assistants and I could find no systematic report measuring the extent to which law schools have upgraded those programs. To fill that gap we surveyed roughly twenty-five percent of ABA accredited law schools to determine how each teaches oral advocacy skills. The survey included responses from forty-four schools, with schools included from each of the four tiers identified by the U.S. News and World Report's rankings of American law schools.[38]

A full summary of our survey appears as Appendix A to this article. Although some areas of concern remain, law schools have upgraded their advocacy offerings since the publication of the ABA report: the typical program is no longer run by students,[39] most courses are graded (instead of pass/fail),[40] a majority of schools no longer pair students, and about seventy-five percent have students argue individually.[41] A number of schools have created appellate practice courses and appellate clinics.[42] Furthermore, a significant number of schools use actual transcripts or realistic appellate problems.[43] In addition, advocacy teachers no longer face a lack of adequate teaching materials, which was one of the concerns raised by the ABA report.[44] Today any number of good books on advocacy[45] and realistic appellate problems are

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[37] I have been involved with upgrading the appellate advocacy-moot court class at two different law schools. For a description of the program that was implemented at McGeorge, see MICHAEL R. FONTHAM, ET AL., TEACHER'S MANUAL FOR PERSUASIVE WRITTEN AND ORAL ADVOCACY: IN TRIAL AND APPELLATE COURTS 102-09 (2002) [hereinafter TEACHER'S MANUAL].

[38] *See infra* App. B.

[39] *See id.* tbl. 2 (reporting the type of instructors utilized for the courses surveyed).

[40] *See id.* tbl. 1.

[41] *See id.*

[42] *See id.* (listing the courses surveyed).

[43] *See id.* (indicating that nineteen schools, for which data on this question were available use real case records to develop the problem used for the oral argument).

[44] Committee, *supra* note 2, at 149-51.

[45] *See* RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL

available.[46] These findings suggest that schools have been attentive to the concerns raised in the ABA report.

Our findings also suggest that law schools could go further in teaching advocacy skills. For example, the forty-four law schools surveyed offered a total of eighty-six courses that included some instruction on appellate advocacy.[47] Some of those courses were upper level electives and appellate clinics.[48] About half of the course offerings were required, but most of those are first year legal research and writing courses.[49] A number of the elective courses had enrollment caps, suggesting that they are not widely available to students.[50]

The staffing of advocacy courses also presents a mixed picture. We found only one course still taught exclusively by students, while three other schools relied on students to supplement faculty instruction.[51] Tenure and non-tenure track faculty co-teach a dozen of the courses, while the remaining courses are evenly split between tenure and non-tenure track faculty.[52] Many of the non-tenure track faculty have long term contracts, which is the minimum currently required by the ABA.[53] The fact that many instructors have the ABA minimum of a long term contracts is not surprising because many of the courses teaching advocacy skills are first year legal writing classes.[54]

Measuring whether those teaching advocacy have mean-

ARGUMENT (2d ed. 2003); MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY (2002); MICHAEL R. FONTHAM, ET AL., PERSUASIVE WRITTEN AND ORAL ADVOCACY: IN TRIAL AND APPELLATE COURTS (2002) [hereinafter ORAL ADVOCACY]; FREDERICK, *supra* note 8.

[46] *See* Committee, *supra* note 2, at 151 (reporting the offer from clerks of the United States Courts of Appeals to identify and prepare records for use in appellate advocacy classes and competitions).

[47] *See infra* App. B, tbl. 1.

[48] *See id.*

[49] *See id.*

[50] *See id.* (noting that eighteen courses had enrollment caps ranging from eight to forty-two students per semester).

[51] *See id.* tbl. 2.

[52] *See id.*

[53] *See supra* note 36 and accompanying text.

[54] *See infra* App. B, tbl. 1

ingful experience, as urged by the ABA report,[55] proved difficult because we were not in a position to assess the quality of the professors' appellate litigation experience. Instead, we looked at the professors' biographies to determine whether they had appellate experience.[56] We found that thirty-eight of the courses were taught by faculty with some appellate experience; in many cases, though, that was limited to work as a judicial law clerk or as counsel in a small number of appellate cases.[57]

While our survey suggests that schools have upgraded their advocacy programs since the ABA report, at many schools training remains limited. For example, many schools do not require a course dedicated entirely to advocacy training.[58] As a result, the only oral advocacy training that many students receive is a single argument in a first year legal writing course. This training is likely to be inadequate. When it occurs during a course in which a student must learn research, proper citation, and writing skills, the legal writing instructor has only a little time to teach a great deal about oral advocacy skills. At best, such a course may require a student to give a single graded oral argument.[59]

Beyond the limited opportunities to present oral arguments, the high percentage of courses taught by non-tenure track faculty suggests another limitation on oral advocacy training. Our study suggests that many faculty members have limited appellate experience[60] and students may interpret a school's decision to leave advocacy training to non-tenure

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[55] *See supra* note 2, at 151.

[56] In order to determine the relevant appellate advocacy experience of the faculty teaching the courses surveyed, my research assistants searched Westlaw databases for instances of specific faculty members appearing "as counsel" before appellate courts and also examined the faculty biographies provided by the law schools on their web sites.

[57] *See infra* App. B, tbl. 2 (summarizing our findings regarding the appellate advocacy experience for some faculty members, where such information was available).

[58] *See infra* App. B.

[59] Gerdy & Berres-Paul, *supra* note 35, at 6-19.

[60] *See supra* note 57 and accompanying text.

track instructors with this limited experience as a signal that the course is not especially important.

III. WHY THE QUALITY OF ORAL ARGUMENT HAS NOT IMPROVED

A. Myths About Effective Oral Advocacy

Our survey demonstrates an improvement in advocacy training since the ABA report. Despite this trend, judges and many commentators still complain about the poor quality of oral arguments.[61] We could find no empirical research that explains why the problem persists.[62]

This section considers why law schools are not doing a better job producing qualified oral advocates even though they are devoting more resources to their advocacy programs. Further, this section argues that many programs still reward the wrong skills.

Even as schools devote greater resources to advocacy training, some commentators still point to the poor quality of that training as the source of the problem. For example, in 1997, Judge Alex Kozinski stated that moot court programs and competitions taught student advocates to be "witty, charming, direct and forthright," but that those were the qualities of a "Boy Scout or a lapdog," not those of a persuasive advocate.[63] He is not alone in that critical assessment.[64] I

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[61] *See* Ginsburg, *supra* note 7, at 569 (discussing advocates unwillingness to respond to judges' questions); Wiener, *supra* note 7 ("Within the year I have been told by a justice of the Supreme Court of the United States that four out of every five arguments to which he must listen are 'not good.'").

[62] Most of the discussions of oral advocacy skills are anecdotal. *See* Alex Kozinski, *In Praise of Moot Court – Not!*, 97 COLUM. L. REV. 178 (1997) (discussing the many problems with moot court programs). *But see* Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Priase of Moot Court – Not!"*, 17 REV. LITIG. 69 (1998) (rebutting Judge Kozinski's arguments about moot court programs).

[63] Kozinski, *supra* note 62, at 183.

[64] William H. Kenety, *Observations on Teaching Appellate Advocacy*, 45 J. LEGAL EDUC. 582, 584 (1995) (discussing the skills taught by moot court programs versus those needed for appellate advocacy); *see also* BEAZLEY, *supra* note 45, at 202.

share the same concern.

Judge Ruggero Aldisert summarizes the prevailing view of why oral argument matters.[65] Among several goals, the oral advocate should take advantage of this singular opportunity to talk directly to the decision maker.[66] Taking advantage of that opportunity means emphasizing the pivotal issues in the brief and coming to "grips with real questions that trouble the court."[67] Other commentators have suggested that lawyers misconstrue the purpose of oral argument and view it as high drama in which they are giving a theatrical performance.[68] Instead, effective oral argument should amount to an engaged conversation with the court.[69]

We cannot hope for better oral advocacy training until moot court classes and competitions recognize why oral advocacy matters. Were an educated novice to observe moot court arguments and listen to the post-argument critiques, the observer would have a skewed understanding about oral argument. Critics of traditional moot court programs and competitions have it right when they argue that "the moot court focus is often on scoring points and displaying verbal brilliance."[70] In effect, they teach that style is more important than sub-

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[65] ALDISERT, *supra* note 45, at 32-33.

[66] *See id.* at 32 ("Oral argument is the only opportunity the lawyer has to personally motivate the judges by force of his or her personality, and convey what Bettinghaus described as [the] three factors that people use in judging a speaker's credibility–trustworthiness, qualifications and personal characteristics.").

[67] *Id.* at 32-33 (listing as goals of oral argument, correcting misimpressions of fact or law held by the judges and demonstrating the logical soundness of the argument).

[68] *See* Kenety *supra* note 64, at 584-85 (discussing the tendency of moot courts to reward verbal aptitude rather than substance); Kozinski, *supra* note 62, at 182 ("In moot court, the game consists of making yourself sound clever.").

[69] GABRIEL & POWELL, *supra* note 12, at 7-7 (quoting Judge Henry Politz as stating that "counsel [should] approach the lectern as though she were going to discuss an interesting and important point of law with three of her senior law partners. The tone should be conversational and persuasive."); *see also* ALDISERT, *supra* note 45, at 311 (quoting Justice Ronald T.Y. Moon, "[o]ral argument is not a speech but a discussion with the appellate judges."); ORAL ADVOCACY, *supra* note 45, at 194 ("If you engage in give-and-take with the judges, you have the best opportunity to influence their views.").

[70] Kenety, *supra* note 64, at 584.

stance. Such an approach misses the point of oral advocacy as a unique opportunity to speak directly to the decision maker in one's case.[71]

My experience as a moot court coach showed me many "ills" of traditional moot court programs and competitions. My observations are anecdotal, but based on years of involvement with moot court programs and competitions.[72]

Consider the selection of moot court competition teams. At many schools, a student board runs the moot court competition program. Such boards often jealously guard their prerogative to select their successors and members of interscholastic teams. Members of student boards often view moot court to be in competition with law review.[73] Board members may resent the academic success of their law review colleagues and view moot court as a place where less academically successful students can excel.[74]

This attitude favors style over substance. Students who have not excelled academically are less able to assess an intellectually compelling argument than they are able to identify an argument that is delivered with flair. In selecting their successors, they are likely to favor students who share their skills and values. When I coached moot court teams but did not select the team members, I was often saddled with advocates who were stylish, but superficial.

I still shudder when I recall one of those advocates. In competition, one of the judges was a prominent civil rights lawyer who had argued some of the cases that were relevant to that year's problem. I sat in discomfort as the judge derailed the student advocate. When the judge pressed the stu-

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[71] *See infra* note 95 and accompanying text.

[72] *See supra* note 8.

[73] M.A. Stapleton, *Mootness the Issue in Student Court Contests*, CHI. DAILY L. BULL., Feb. 21, 1997, at 3.

[74] *See* Committee, *supra* note 2, at 145 (stating that this model originated at Harvard Law School in the early twentieth-century "to keep up the interest of those students who did not do well enough in the first year to rank high in the class."); *see also* Stapleton, *supra* note 73, at 3 (holding up moot court programs as an alternative for those students who do not qualify for law review).

dent, he tried to go back to his canned answers and seemed to treat the questions as an unwelcome distraction. His failure to advance to the next round was appropriate; but had he not run into a well informed judge, the judges might have rewarded his slick presentation. This example is illustrative of the weaknesses in traditional moot court programs and classes.

First, too many competitions reward style over substance.[75] This may result from poorly prepared judges who are often seen scanning the bench brief during the argument and, judging from the quality of their questions or from their silence, scanning it for the first time.[76] Judges who lack familiarity with the nuances of the case are more likely to fall back on style as a basis to select a winner. They may also overvalue glib arguments that sound good at the moment but would not hold up if the judges were to examine the plausibility of the arguments in light of the controlling case law.[77]

Overvaluing form over substance may also result from the grading criteria used in some competitions. The competition may give speaking style as much credit as substance of the argument. Below, I have attached a copy of a grading sheet used in McGeorge's Appellate Advocacy program.[78] We designed our program to reward substance and to focus on the advocate's ability to answer the judges' questions.[79] It is inevitable that, to some extent, grading criteria in any course will tend to reflect forensic skills, but the McGeorge grading sheet gives less emphasis to style than do many similar grading sheets in use elsewhere.[80]

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[75] *See* John T. Gaubatz, *Moot Court in the Modern Law School*, 31 J. LEGAL EDUC. 87 (1982); Kenety, *supra* note 64, at 584; Kozinski, *supra* note 62, at 182.

[76] *See* Hernandez, *supra* note 62, at 84 (discussing the poor quality of moot court judges); Kenety, *supra* note 64, at 584-85 (noting "[m]oot court judges are far more likely than real judges to be unprepared or to ask off-the-wall questions.").

[77] *See* Gaubatz, *supra* note 75; Kenety, *supra* note 64, at 584; Kozinski, *supra* note 62, at 182.

[78] *See infra* App. A.

[79] For more on my views on teaching appellate advocacy, see TEACHER'S MANUAL, *supra* note 37.

[80] Compared to the Oral Argument Grading Sheets of the Jessup Moot Court

Rewarding style over substance may also result from widely misunderstood instructions given to judges. Obviously, advocates should not win or lose as a result of being assigned the weaker substantive side of an argument.[81] As a result, judges are typically instructed not to decide the case on the merits.[82] Judges may interpret that to mean they should judge the case on the advocates' style. Instead, they ought to judge on the intellectual content of the argument. An effective advocate can make a stronger case out of a weak position than a less adept advocate.[83]

The second lesson that I take from the anecdote recounted above is that many student-run programs reward style as well. Students who have done well in many programs do so because of style, rather than substance.[84] In selecting their successors to run the next year's program, the student board is likely to favor people like themselves. No doubt, the student advocate whom I described above became a board member and, given his view of advocacy, would almost certainly select similar advocates to represent the school in the future.

The anecdote also suggests that, even though law schools have upgraded their programs, the quality of oral advocacy

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Competition, Traynor Moot Court Competition, Thomas Tang Moot Court Competition, and BYU Law School, Case Western Law School, and University of San Diego Law School course grade sheets for oral argument (on file with author).

[81] *See* Hernandez, *supra* note 62, at 75 (stating that "[a] truly bad case deserves to lose given the law and facts. It is hardly admirable for attorneys to pursue, much less win, cases that can lead to a miscarriage of justice and ever-increasing cynicism among the public.").

[82] *See* Niagara Moot Court Tournament 2003-2004 Official Rules 23 (2003), http://www.law.case.edu/student_life/journals/canada_us/new/2003-04%20NiagaraRules.doc (telling judges that "scoring should not reflect the actual merits of the case but only the advocacy skill and legal analysis of the participant.") (last visited Feb. 23, 2006); *see also* Kozinski, *supra* note 62, at 181-82.

[83] Kozinski, *supra* note 62, at 196 (arguing that moot court competitions should be judged on the merits because even a bad case can be advanced, or at least a bad outcome mitigated, by a good advocate).

[84] Judges who select the top advocates are likely to overvalue style, not substance. Rewarding substance requires a thorough understanding of the legal issues in the case. Given the limited amount of time that many judges, often young lawyers, have to devote to preparing to judge, many of them simply lack that kind of thorough familiarity with the merits of the case.

has not improved at the same rate partially because the judges come from the old tradition. Interscholastic competitions have proliferated[85] and it is hard to find volunteers to serve as judges for moot court programs and competitions.[86] Finding qualified judges, even for otherwise prestigious competitions, is a challenge. Within a legal community, moot court programs are likely to have their best success in soliciting young lawyers to serve as judges. Among young lawyers, those most likely to agree to serve as judges are those who have been involved in their alma mater's moot court program. Old habits die hard. Not surprisingly, my former student remained active in the program after he began practicing law. Lawyers who were part of a student run program are likely to share the values of that program. Despite upgrades in its program, those judges will select as winners advocates who resemble themselves. They will also deliver critiques to the advocates that are likely to reinforce bad habits. No doubt, that perpetuates a system that values style over substance.

The anecdote suggests a third problem with traditional moot court programs and competitions. The judge's questions flustered the student advocate. After each question, he tried to go back to his argument. But the judge would not accept glib answers to his questions. In fairness to the student, because of the judge's expertise, the judge had a far greater understanding of the legal issue than did most of the other judges. But the questions went to the core of the legal issue and his insis-

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[85] Based on a survey of Internet sites, there are at least fifty national moot court competitions running currently, at least eleven of them have been running for fifteen years or less (on file with author).

[86] Various schools routinely solicit alumni to be judges via their web sites and competitions solicit bar association members, alumni of the sponsoring schools, and local judges. *See, e.g.*, UCLA Moot Court Honors Program, *Judge Information* (2005), http://www.law.ucla.edu/moot/judges/judge_home_page.htm (last visited Feb. 23, 2006); Stanford Law School Alumni, *Volunteering for the Law School* (2005), http://www.law.stanford.edu/alumni/volunteer/teach.html (last visited Feb. 23, 2006); Northwestern University School of Law, *Volunteering* (2004), http://www.law.northwestern.edu/volunteers (last visited Feb. 23, 2006); American University Washington College of Law, *Inter-American Human Rights Moot Court Competition* (2002), http://www.wcl.american.edu/humright/mcourt/2002/judges.cfm (last visited Feb. 23, 2006).

tence reflected that he was not satisfied with the student's answers. Because the questions did raise critical weaknesses in the advocate's position, the student should have been prepared to answer them.[87]

Many student advocates return to canned answers because, given the poor quality of judging, glib answers are often sufficient.[88] Further, many in the moot court business advocate that stratagem. I have listened to countless critiques in which judges tell advocates that their job is to control the argument. Judges are often explicit in advising that, when the questioning gets tough, the advocate should segue back into her main points.[89] But students interpret this as an invitation to divert the court's attention and return to their presentation. Students often come away from their moot court experience believing the goal of oral argument is for them to give their presentation, not to address the court's concerns.[90]

Indeed, even some otherwise credible texts on advocacy contribute to this state of affairs. Many texts state that oral advocates should develop a clear theme.[91] But the authors'

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[87] *See* ORAL ADVOCACY, *supra* note 45, at 171 (arguing that an effective advocate will anticipate and prepare responses to his or her opponent's best points and issues that may trouble the judges): *see also* FREDERICK, *supra* note 8 ("[V]irtually every great advocate will devote a substantial portion of time to thinking of as many questions as possible about the record, the parties' positions, the opponent's arguments, the cases, the statutory and regulatory context, and the policies underlying the advocated rule.").

[88] *See supra* notes 74-76 and accompanying text.

[89] *See* FREDERICK, *supra* note 8, at 90 (challenging the advocate "to anticipate opportunities . . . to segue from questions designed to probe weak points in the case back to affirmative points that persuade the court of the soundness of the position being pressed."). *See generally* ALDISERT, *supra* note 45, at 373 (quoting Justice John M. Walker, Jr., in response to a question of how to deal with a single judge who is bombarding you with questions you feel are irrelevant) ("Say, 'I want to answer your question but then turn to the other critical points, (x) and (y), raised by this appeal.' Then answer the question briefly and move rapidly to (x) and (y). Then hope that this maneuver works."); *id.* at 375 (quoting Justice Douglas H. Ginsburg) ("[A] lawyer should answer the question as succinctly and briefly as possible. Once an answer as [sic] been provided, the lawyer should immediately go back to his argument and continue with points he would like to address.").

[90] Kozinski, *supra* note 62, at 187 (lamenting that students think speaking is so important that they will cut off the judges' questions).

[91] *See* ALAN D. HORNSTEIN, APPELLATE ADVOCACY IN A NUTSHELL 11 (2d ed.

examples often suggest that oral argument is more theatrical than substantive. One commonly cited example of a good theme is the late Johnnie Cochran's famous line in his closing argument to the jury in *People v. Simpson*: "if the glove doesn't fit, you must acquit."[92] As a theme for a jury trial, Cochran's phrase was brilliant, but it fails as a theme for an argument to a judge. Judges are more skeptical than are juries and have more time to reflect on the merits of a case and more experience in sorting out legally relevant material.[93] Advising student advocates to model their themes on examples like Cochran's suggests that oral argument is a show where cleverness and glibness are more important than substance.

For many years when I directed McGeorge's Appellate Advocacy program, I participated in our orientation program for incoming students by setting up a mock oral argument. Inevitably, after watching the judges grill the advocates, students in the audience asked why the judges did not allow the advocates to give their prepared presentations. Questions like that are understandable from novices but they reflect a more general problem: too many participants in traditional moot court continue to believe that the goal is for the advocates to give presentations. That kind of thinking leads to bad advocacy.

As developed above, many schools have upgraded their moot court offerings, yet judges still lament the poor advocacy skills of many lawyers appearing before them. I have argued why that may be. In the next subsection, I want to explore another reason why oral advocacy skills are still lacking. Four words sum it up: kinder, gentler law schools.

1998) ("Perhaps the most important and helpful rhetorical device for effective appellate advocacy is the argument's theme—the phrase that pays."); *see also* ORAL ADVOCACY, *supra* note 45, at 191 (showing that a central theme "provides strength and focus to the argument").

[92] *See* HORNSTEIN, *supra* note 91, at 16-16 (quoting Johnnie Cochran).

[93] *See* FREDERICK, *supra* note 8, at 142 (stating that without the substance underlying the theme, "the advocate has no case," no matter how clever the theme is); *see also* ORAL ADVOCACY, *supra* note 45, at 151 ("Judges are usually intelligent and experienced, and are rarely impressed by slick contentions. Only a logical argument, backed by sincere belief, is likely to persuade them.").

B. Effective Oral Advocacy and the "Kinder," Gentler Law School

Understanding the inverse correlation between effective advocacy skills and today's kinder, gentler law schools requires an examination of what judges and critics of traditional moot court programs find objectionable about the canned, slick presentations that so many advocates give and that often lead to success in competitions. To make the point, one must ask why oral advocacy matters and then compare moot and real arguments to see how different they are.

Oral advocacy matters because it is the only opportunity that counsel has to talk directly to the decision-maker in the case.[94] In many courts, judges have read the briefs submitted by counsel and may have prepared a tentative ruling.[95] Often, attorneys read the court's opinion and are frustrated that the judges misunderstood the case. Oral argument is the opportunity to correct misunderstandings and to address the judges' concerns.[96]

Prior to oral argument, judges have had the chance to read counsel's brief, in which she should have developed her best arguments. As a result, oral argument may influence the court's decision in relatively few cases.[97] But the way in

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[94] *See* ALDISERT, *supra* note 45, at 32 (stating that oral argument "is the only opportunity of the lawyer to face the court eyeball to eyeball without 'filtering' by the law clerks"); FREDERICK, *supra* note 8, at 3 ("Ordinarily, [oral argument] is [an advocate's] only chance to stand face to face with the court and plead their case directly without the filter of a written brief."); *see also* ORAL ADVOCACY, *supra* note 45, at 152 (discussing oral argument as the "single opportunity to address the decisionmakers face-to-face").

[95] *See* ALDISERT, *supra* note 45, at 305 (recounting that the author's practice is to reach a tentative decision after reading the briefs, but before oral argument); *id.* at 309 (quoting Judge Carlos F. Lucero as saying that he comes to a "preliminary opinion" after reading the briefs).

[96] *See* HORNSTEIN, *supra* note 91, at 277 (stating that the goal of oral argument is "to dispel any uncertainties and clarify any doubts about the correctness of one's position."); *see also* ORAL ADVOCACY, *supra* note 45, at 194 (suggesting that because "[m]istaken impressions may result from reading the cold, written page," the advocate should use oral argument "to clear up misunderstandings").

[97] GABRIEL & POWELL, *supra* note 12, at 7-7 ("[J]udges estimate that oral argument may alter the outcome in no more than 10 percent of the cases ar-

which an advocate can change the court's mind is by going to the heart of the case: recognizing the weaknesses in the advocate's position and the judges' concerns about the case. The advocate's role is to help the judges resolve those difficulties.[98] The only way that counsel can help the court is by engaging in a dialogue with the bench.[99]

Style may help an advocate by demonstrating that she is open to questions from the court. Thus, eye contact and other principles of good speaking will invite questions from the bench.[100] But a nice style is only peripheral. What matters is the attorney's ability to answer the court's questions thoroughly.[101]

Commentators are uniform on the components of good oral argument: counsel needs to present a clear opening, providing a roadmap of her argument, including signposts that signal the different components of the argument.[102] Counsel

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gued"); Paul R. Michel, *Effective Appellate Advocacy*, 4 LITIG., Summer 1998, at 19, 21 (stating that as a federal circuit judge, "oral argument causes [the author] to reverse [his] inclination in only about one of five cases," but it could influence his vote in about half of all cases); *see also* Ginsburg, *supra* note 7, at 567-68 ("As between briefing and argument, there is near-universal agreement among federal appellate judges that the brief is more important . . . In some federal circuits the brief is all the court will receive in a high percentage of appeals.").

[98] *See* Ginsburg, *supra* note 7, at 569 (stating that oral argument can "give counsel a chance to satisfy the court on matters the judges think significant, issues the judges might puzzle over in chambers, and resolve less satisfactorily without counsel's aid"); Michel, *supra* note 97, at 22 ("Oral argument can win cases when counsel effectively answers questions. Effective answers are direct, dispassionate, specific and candid.").

[99] *See* Ginsburg, *supra* note 7, at 569 ("Oral argument, at its best, is an exchange of ideas about the case, a dialogue or discussion between court and counsel.").

[100] *See* BEAZLEY, *supra* note 45, at 193 (directing that an advocate should "maintain eye contact so that [he] can see any nonverbal signals that one of the judges has a question."); ORAL ADVOCACY, *supra* note 45, at 168 ("Eye contact establishes rapport and enables you to communicate conviction.").

[101] *See* ALDISERT, *supra* note 45, at 357 ("Ultimately, judges are interested in what you say; not how you said it. [Judges] are not out there judging a debate or a law school moot court competition. [They] have asked for oral argument because [they] need a little more substantive help from the lawyers, not an Oscar-worthy performance."); Michel, *supra* note 97, at 22 ("Success seldom depends on eloquence. It turns instead on anticipating the inevitable, skeptical questions, and preparing effective answers.").

[102] *See* BEAZLEY, *supra* note 45, at 189 (discussing the advantages of present-

should develop a theme wherever possible that unites her several arguments.[103] The attorney should aim for a flexible style that allows her to move to the part of the argument that most concerns the court.[104] Real judges want help writing their opinions and need to understand, if they are leaning towards the attorney's position, how to overcome legitimate weaknesses in the case.[105] Counsel must prepare in advance to answer hard questions about her position.[106] Counsel must never put off answering the court's questions; instead,

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ing a roadmap of the points to be covered); ORAL ADVOCACY, *supra* note 45, at 183 (arguing that oral argument should contain an overview, which uses signposts that help "the court understand the direction of the argument."); FREDERICK, *supra* note 8, at 20 ("[T]he opening should signpost for the court the two to four points the advocate hopes to make, using phrases the advocate hopes will be memorable to the court.").

[103] *See* BEAZLEY, *supra* note 45, at 191 ("Having a theme in mind can help you keep the [c]ourt focused on the reason for a decision in your favor. Frequently, when questions have led you away from the point of your argument, you can recover by returning to your theme."); FREDERICK, *supra* note 8, at 84 (talking about the "mantra" as "a phrase or sentence to repeat several times so that it becomes the theme of the argument."). As discussed above, too often students choose themes that are more suitable to jury trials than to appellate arguments. Judges can see through slick themes. Instead, the theme should have real substance that holds together upon closer scrutiny. ORAL ADVOCACY, *supra* note 45, 191-93.

[104] FREDERICK BERNAYS WIENER, EFFECTIVE APPELLATE ADVOCACY 183-84 (Christopher T. Lutz & William Pannill eds., rev. ed. 2004) ("Counsel must . . . be sufficiently flexible to vary his argument on the basis of the reception it receives."); *see also* ALDISERT, *supra* note 45, at 364.

[105] *See generally* FREDERICK, *supra* note 8, at 5 ("Members of the [Supreme] [C]ourt themselves can be quite explicit about using oral argument to flesh out issues that shape the opinion."); Laurence H. Silberman, *From the Bench: Plain Talk on Appellate Advocacy*, 20 LITIG., Spring 1994, at 3, 60 ("Skilled advocacy improves the quality of our decisions. . . . The better the lawyers, on both sides of a case, the more likely it is that a judge will arrive at, or at least come close to, the right answer."); Karen J. Williams, *Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Arguments*, 50 S.C. L. REV. 591, 599 (1999) ("The questions from the bench are the only indication of what issues are bothering the judges and may clue you in on what is preventing them from seeing the case your way.").

[106] *See* Williams, *supra* note 105, at 595 ("To be thoroughly prepared for oral argument, you need to . . . begin thinking about your appeal from . . . where you ended in the briefs. Identify those points of law upon which the outcome of the case is likely to turn and which, when viewed objectively, could be resolved in favor of either party.").

she should give a direct "yes" or "no" answer and then seek to elaborate on her answer.[107] Failing to do so causes counsel to miss the opportunity to persuade the court. Further, counsel must be fully candid with the court. Misstating the facts or the law leads to a loss of the credibility that is so invaluable in getting the court to accept one's legal position.[108]

Successful oral advocates should try to use the court's questions to their advantage. In that sense, an oral advocate should try to control the argument; if an advocate can successfully understand the weakness of her case and thus anticipate the judges' concerns, she can explain why her case can win nonetheless.[109] She can do so only if she listens carefully to the questions and understands the law and the facts. Undoubtedly, counsel cannot anticipate all of the judges' questions; however, through preparation cousel should be able to anticipate most questions and have thoughtful answers.[110] If counsel's argument really has fatal flaws to which she cannot respond, one wonders why the case is before the court at all. On the premise that the case is not frivolous, successful counsel should be able to deal with the weakest part of her case.[111]

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[107] *See id.* at 599 ("Respond immediately to a question with a 'yes,' 'no,' 'it depends,' or 'I don't know.' Follow the short answer with a concise explanation and citation to the record or precedent as necessary."); *see also* BEAZLEY, *supra* note 45, at 194 ("The court will be much better able to listen to your explanation if you first satisfy the court's need for an answer to its question.").

[108] *See* ORAL ADVOCACY, *supra* note 45, at 186; FREDERICK, *supra* note 8, at 150 ("The worst sin of all is knowingly to mis-cite authority to a court or to take a snippet in an opinion and represent that as the holding of the court." These types of errors "can detract from the substance of the argument and diminish the credibility of the advocate in the eyes of the court.").

[109] *See* ALDISERT, *supra* note 45, at 360 (remarking that "you, not your opponent, must control the direction of your argument," and to that end the advocate must mention adverse facts and case law "up front and tell [the court] why they do not hurt you."); ORAL ADVOCACY, *supra* note 45, at 195 (suggesting that when dealing with "[q]uestions that reveal troubling issues. . . . [y]ou must prepare . . . by considering weaknesses in advance and planning the best possible responses").

[110] *See* ORAL ADVOCACY, *supra* note 45, at 171; FREDERICK, *supra* note 8, at 62-64 (reminding advocates to "identify [their] opponent's best points." Try to think of issues that may trouble the judges "and then create arguments for these points and rehearse the responses.").

[111] *See* Kenety, *supra* note 64 ("Practicing attorneys will often discuss the

No doubt, effective oral argument includes other skills. Developing a compelling conclusion that summarizes the most persuasive points in the argument is one such skill, as is the ability to deliver an effective rebuttal.[112] But engaging the court in a dialogue during which counsel effectively addresses the court's concerns is the primary tool of the successful oral advocate.[113]

Implicit in the discussion above is the fact that success in moot court differs from success in real arguments.[114] Style counts too much in moot court arguments, whereas the ability to answer hard questions counts most of all in real arguments. Student advocates often believe that controlling the argument means avoiding hard questions and getting back to their canned arguments.[115] Grading criteria in student competitions may even reward an advocate's ability to get through major arguments.[116] Student advocates avoid making concessions, despite the fact that real judges expect sensible concessions.[117]

Student advocates may fall back on style, apart from the lessons that they are taught in their moot court programs,[118]

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weakest points in their own case because they know this is where they have to convince the court if they are to prevail."); *see also* ALDISERT, *supra* note 45, at 317 (quoting Third Circuit Chief Justice Edward R. Becker, "Acknowledge the vulnerable points in your position and then tell the [c]ourt how to deal with them."); *id.* at 323 (quoting Second Circuit Justice Roger J. Miner quoting Lawrence Wallace, "If you can't answer the question, 'What are the strongest points to be made for the other side?' you're not really prepared to argue the case.").

[112] BEAZLEY, *supra* note 45, at 192, 195-96; ORAL ADVOCACY, *supra* note 45, 198-201.

[113] *See supra* note 99 and accompanying text.

[114] *See supra* notes 69-96 and accompanying text.

[115] TEACHER'S MANUAL, *supra* note 37, at 31; *see also* Ginsburg, *supra* note 7 ("Questions should not be resented as intrusions into a well-planned lecture.").

[116] *See supra* note 96 and accompanying text.

[117] See ALDISERT, *supra* note 45, at 369 (arguing that concessions can serve two goals. First, concessions can help avoid wasting time arguing over trivial points. Second, concessions planned out during preparation will be better thought out.); FREDERICK, *supra* note 8, at 59 (stating "A skillfully made concession . . . can make the advocate more credible to the court by demonstrating the reasonableness of the advocate's position.").

[118] *See supra* Part II(a).

because answering questions is difficult.[119] Hence even if a law school has in place an effective advocacy program, students need more experience in the kind of flexible interchange that produces good oral argument.

That begs the question of how else law schools might teach this all important skill. In considering this question, I offer my own experience. When I went to law school, the only required advocacy course was a first year legal writing course taught by upper level students. During the second semester, a classmate and I submitted a joint brief and gave a mock argument to a panel of upper level students. Beyond that, moot court was an extracurricular activity. I learned something about advocacy in the program, but I am not sure how much.

Shortly after graduating from law school, I served as counsel in cases before federal district courts in Philadelphia, New Orleans, and before the United States Court of Appeals for the Fifth Circuit. In thinking about my experience, I question how I was able to function as an effective oral advocate. As unpleasant as I found the Socratic method as a student,[120] I concluded that I had learned invaluable lessons

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[119] Kenety, *supra* note 64, at 584 ("Law students often dread questions for fear they may not be able to answer them.").

[120] I memorialized my views of law school in a letter that I wrote to Professor Roland Pennock at Swarthmore College. Professor Pennock was organizing a panel discussion on law school and he solicited views from those of us currently in law school. On February 20, 1973, I wrote, in part:

> The transition from [high school] teaching to being a student was not very easy: teaching provided me with frequent and positive feedback; the result of my energy was measurable in human growth; being a first year law student is a hazing . . . . Because you want to counsel undergraduates and do not anticipate changing the law school atmosphere, you might make students aware of the intensity of the competitive environment and of the limited success that is built into the system (few exams; the majority of grades deferred until June; training in the Socratic method which is aimed at [stripping] down inefficient thinking and rebuilding minds in a new shape - a device frequently used to embarrass, if not humiliate, first year students; the ten percent cut off point for Law Review which leaves many striving and ambitio[us] and bright students feeling like failures).

Letter from Professor Michael Vitiello, Professor of Law at The University of the Pacific, McGeorge School of Law, to Professor Roland Pennock, Professor Emeritus

about oral advocacy through the rigorous grilling that my best professors provided.[121]

An effective Socratic dialogue is an invaluable tool to teach advocacy skills. A professor's questions ought to be similar to those that a judge would ask an attorney. Good law professors and judges expect answers to be responsive. The Socratic dialogue should teach students the importance of listening to questions and framing thoughtful answers. Students should realize that their answers will in turn inspire follow up questions and that they must be able to think through the implications of their answers.[122] Like oral argument where judges ask probing questions to bring out the specific issues in the case,[123] a classroom discussion should focus on the strengths and weaknesses of different legal positions.

Students in law school today are far less likely than students in my generation to receive a similarly rigorous education.[124] That is so because the Socratic method has been under attack for over thirty years and, although clear empirical evidence is unavailable, professors today are almost certainly more likely to use a modified, less demanding So-

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of Political Science at Swarthmore College (on file with author).

[121] Vitiello, *supra* note 14, at 971.

[122] *Cf.* FREDERICK, *supra* note 8, at 59 (stating that a "critical dimension to the court's decision-making process is understanding the likely consequences that will flow from its ruling" and thus an effective advocate must be able to answer hypothetical questions that test "the parameters of the applicable rule").

[123] In an exercise sponsored by the ABA, Justice Stephen Breyer, then a judge for the United States Court of Appeals for the First Circuit, discussed his expectations of lawyers during oral argument. Videotape: Effective Arguments to the Court: Arguments to the Supreme Court, Tape 3 (A.B.A. Consortium for Professional Education and the Section of Litigation 1999). Justice Breyer explained that he relies on oral argument to discover "the lawyer's characterization of the issue from their point of view." *Id.* He also stated:

> [W]e've read the briefs, we're trying to think about the issues in the case. . . . And the lawyers, although they want to win for their clients, we feel they are there to help us, and therefore by trying to get these questions out, there's something either that is really bothering me or I want to use the best argument of the other side to elicit the response.

Id.

[124] Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667, 681-84 (2005) (discussing the decline of the Socratic method in law schools).

cratic teaching method than did the previous generation of law professors.[125]

Commentators have leveled numerous attacks on the Socratic Method. For example, one study concluded that "the Socratic method alienates, oppresses, traumatizes and silences women."[126] Some critics argue that the method is ineffective for all students because it "fails to prepare the student for work as an attorney"[127] and suggest that it may be responsible for lawyers' incompetence[128] and incivility.[129] Further, critics allege that it causes students to become cynical: the Socratic method and other traditional techniques "set students' moral compasses adrift on a sea of relativism, in which all positions are viewed as 'defensible' or 'arguable' and none as 'right' or 'just.'"[130] In effect, the Socratic method leads to moral numbing. As summarized by one writer, the Socratic method is "infantilizing, demeaning, dehumanizing, sadistic" and "destructive of positive ideological values."[131]

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[125] *Id.* at 681 ("The traditional Socratic method . . . has vanished from American law schools.").

[126] Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't' Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 38 (1997).

[127] Ronald Chester & Scott E. Alumbaugh, *Functionalizing First-Year Legal Education: Toward a New Pedagogical Jurisprudence*, 25 U.C. DAVIS L. REV. 21, 24 (1991).

[128] *See* Stropus, *supra* note 14, at 460-62 (discussing the allegations that the Socratic method fails to prepare students to practice); Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View From the Trenches*, 65 U. CIN. L. REV 381, 391 (1997) (quoting a recent graduate stating that the Socratic method did not teach him what to do in court).

[129] Paul T. Hayden, *Applying Client Lawyer Models in Legal Education*, 21 LEGAL STUD. F. 301, 303 (1997) (positing that students emulate their professors behavior and "[a] Kingsfieldian professor, for example, may send the message to students that the super-competent lawyer is brusque, dominating, and often condescending to those less competent (a category which certainly includes clients)."); Roger E. Schechter, *Changing Law Schools Make Less Nasty Lawyers*, 21 GEO. J. LEGAL ETHICS 367, 381 (1996) ("The rigor of the Socratic method can all too often slide into a dismissive or sarcastic exchange in which the teacher communicates an unspoken but nonetheless powerful message that rude or mean-spirited wise cracks, and even temper tantrums, are entirely appropriate behavior").

[130] John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, 58 LAW & CONTEMP. PROBS. 87, 102 (1995).

[131] Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 407

So anathema is the Socratic method that many law schools now distance themselves from the historical image of law school and advertise themselves as "kinder and gentler," than the traditional law school where Professor Kingsfield, the archetypal law professor in *The Paper Chase,* roams the halls.[132]

The literature is replete with suggested remedies, including allowing students to demur if called upon or giving advance notice when a professor will call upon a particular student.[133] Further, critics of the Socratic method and law school education generally urge that we validate our students.[134] Professors must tailor their teaching to reach the current generation raised on the media, with shorter attention spans, and less motivation than previous generations of students.[135] Critics argue that law professors ought to allow their students to voice their own views and not force them to take positions in which they do not believe.[136]

(1971).

[132] *See, e.g.*, Casman, *supra* note 13; Adam Liptak, *Forget Socrates*, N.Y. TIMES, Apr. 25, 2004, at 34; Tony Mauro, *All-Online Law School Challenges* Precedents, USA TODAY, Oct. 12, 1999 at 6A; Linda K. Wortheimer, *A Kinder Gentler Law School: SMU UT Take Sharing Approach to Making 1st Year Less Daunting*, DALLAS MORNING NEWS, Sept. 13, 2001, available at http://www.orientation.vermontlaw.edu/asp/director.htm (last visited Feb. 26, 2006).

[133] *See* Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 82 (1995) (suggesting professors give introverted students advance notice of being called on, advance notice of questions, or time to think before answering to improve their performance); Sarah E. Ricks, *Some Strategies to Teach Reluctant Talkers to Talk About Law*, 54 J. LEGAL EDUC. 570, 573 (2004) (discussing ways teachers can modify the Socratic method to make students more comfortable speaking in class).

[134] Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 79-80 (2002) (describing a teaching method more focused on interpersonal relationships and the emotional needs of the students).

[135] *See, e.g*, Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 3 (2002); Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 956 (1995); Craig T. Smith, *Synergy and Synthesis: Teaming "Socratic Method" With Computers and Data Projectors to Teach Synthesis to Beginning Law Students*, 7 LEGAL WRITING 113, 114 (2001).

[136] Ann J. Iijima, *Lessons Learned: Legal Education and Law Student*

Measuring the extent to which law professors have responded to these criticisms by adopting gentler teaching techniques is difficult.[137] Even though critics continue to rail against the Socratic method,[138] I suspect that many law professors have abandoned the more demanding version of the Socratic method in favor of a "kinder and gentler" classroom style. That is a shame.

Elsewhere, I have written extensively about the Socratic method and attempted to address the main criticisms leveled against its use.[139] Here, I want to explore the kind of teaching that critics of the demanding form of the Socratic method propose in its place and discuss why that kind of classroom experience is ineffective in training students to be effective oral advocates.

Judges expect precise answers from advocates.[140] They

Dysfunction, 48 J. LEGAL EDUC. 524, 529 (1998) (arguing that forcing students to advocate for ideas they do not support leads to "moral neutering").

[137] Stephen I. Freidland attempted to quantify how often the Socratic method was used in classrooms and found that most professors use a combination of methods. Stephen I. Freidland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28 (1996) (explaining an overview of the results of his survey showing that "[t]hirty percent of those who used the Socratic method did so 'most of the time,' and forty-one percent used it 'often.' Of those remaining, twenty-one percent used it 'sometimes' and only five percent stated that they 'rarely' used it."). This task is also made more difficult by the problem of identifying exactly what people mean when they use the term "Socratic method." *See* Vitiello, *supra* note 14, at 961-62 (discussing the various definitions of the term "Socratic method").

[138] *See e.g.* Andrew Moore, *Conversion and the Socratic Method in Legal Education: Some Advice for Prospective Law Students*, 80 U. DET. MERCY L. REV. 505, 506-509 (2004) (warning prospective law students about the dangers of the Socratic method to their mental health); Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN'S L. J. 93, 94 (2004) (stating that "mainstream legal pedagogy (essentially the case method and Socratic Method) is full of flaws and, well, let's face it, just plain bad teaching.").

[139] Vitiello, *supra* note 14, at 955 (giving an overview of the criticisms of the Socratic method and arguing that they are not only misinformed, but that removing the Socratic method from law school harms students and leaves them less prepared for the challenges of the legal profession).

[140] *See* ALDISERT, *supra* note 45, at 318. Justice Deanell Reece Tacha of the Tenth Circuit stated:

> The most common failing I see in both oral argument and brief writing

care little about the personal views of attorneys appearing before them and even less about their feelings. Judges may bruise an advocate's ego when the advocate's performance is inadequate.[141] In making a classroom too "kind," a law professor may create the impression that careless thinking meets the lawyer's professional responsibility. In such a setting, the professor loses an opportunity to introduce her students to the realistic demands of the practice of law.[142]

Apart from the missed opportunity to acclimate students to the demands of the courtroom and law practice general-

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> is the failure to be analytically precise about the issues addressed on appeal. . . . The most common complaints I hear from appellate judges relate to . . . lack of focus, covering too many issues, and scattering case authority and facts throughout the brief and argument so that they lose their impact on the issues to which they are most germane.

Id.

[141] The lack of concern for an attorney's feelings was demonstrated by a letter from United States District Court Judge William Harold Cox, a notorious segregationist, to John Doar, the head of the Civil Rights Division of the Justice Department during the early 1960s and upon whom Gene Hackman's character in the movie, MISSISSIPPI BURNING, was based. *See generally* Douglas O. Linder, *Bending Toward Justice: John Doar and the "Mississippi Burning" Trial*, 72 MISS. L. J. 731 (2002). No doubt, this is an extreme example, but the letter illustrates the kind of attitude lawyers may have to face:

> Dear Mr. Doar,
> I have a copy of your letter of October 12 . . . [I] thought I had made it clear to you . . . that I was not in the least impressed with your imprudence in reciting the chronology of the case before me with which I am completely familiar. If you need to build such transcripts for your boss man, you had better do that by interoffice memoranda because I am not favorably impressed with you or your tactics in undertaking to push one of your cases before me. I spend most of my time fooling with lousy cases brought before me by your department in the civil rights field, and I do not intend to turn my docket over to your department for your political advancement . . . . You are completely stupid if you do not fully realize that each of the judges in this court understands the importance of this case to all litigants. I do not intend to be hurried or harassed by you or any of your underlings in this or any court where I sit and the sooner you get that through your head the better you will get along with me, if that is of any interest to you. . . .

Id. at 755-56.

[142] *See* Stropus, *supra* note 14, at 472 (emphasizing the loss to law students from teachers and schools that do not use the Socratic method to teach students to think analytically).

ly,[143] the professor who allows students to state their own views for fear of moral numbing, by forcing them to support positions contrary to their own values, disserves his students. Implicit in the discussion about the appropriate solicitation of students' personal views is that much of a classroom discussion is devoted to individuals' value choices.[144] That suggests a misuse of the classroom.

The failure to have students argue positions that they do not believe in amounts to educational malpractice. As I have stated elsewhere, "[t]he most important feature of a legal education is that it challenges our views and forces us to examine them with care."[145] Students must be able to argue those positions because lawyers must be able to anticipate and rebut their opponents' arguments. A lawyer who lacks that skill cannot adequately represent her clients.[146] Further, students ought to recognize the reality that advocating a position

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[143] Even if a person chooses not to be a litigator, she will need oral advocacy skills in many other settings as well. Judges expect their law clerks to present competing arguments to help the judge decide how to vote. A senior partner expects a junior associate to explain the law concisely to the partner and perhaps to the client. A transactional lawyer must make presentations to clients and to counsel representing the other side in the transaction.

[144] Gerald Hess, a leading advocate of the "kinder, gentler law school," suggests using student interests and ideas to build the class. He quotes his students complaining that their views are not included:

> We've come across some cases where race was an issue or women's rights should have been an issue and we could have fleshed it out more. Some people might look at that as getting sidetracked. But we also have to understand that we are learning law in a vacuum, but when we get out in the real world we are dealing with people who are not the same color, that are not the same gender and religion or sexual orientation. And we need to learn to deal with that effectively.

Hess, *supra* note 134, at 100 (quoting a student interviewee). Professor Hess also advocates allowing students some role in designing the course, from choosing coursework to designing the evaluation method. *Id.* at 97-98.

[145] Vitiello, *supra* note 14, at 997; *see generally* Elizabeth Garrett, *Becoming Lawyers: The Role of Socratic Method in Modern Law Schools*, 1 GREEN BAG 2d 199, 202; Patricia Mell, *Taking Socrates' Pulse: Does the Socratic Method Have Continuing Validity in 2002?*, 81 MICH. BUS. L.J. 46, 46 (2002); *see also* Phillip E. Areeda, The Socratic Method, Lecture at Puget Sound (Jan. 31, 1990), *in* 109 HARV. L. REV. 911, 917-18 (1996).

[146] Vitiello, *supra* note 14, at 997.

contrary to her own beliefs may be necessary as part of her professional responsibility to advocate zealously on behalf of her client.[147]

Other problems exist when law professors solicit students' views. Envision a class in which the professor is teaching the law of rape. Soliciting students' views may invite the expression of some boorish, hurtful points of view.[148] But even more importantly, the solicitation of students' views is distracting from the core function of the classroom. If professors are using the classroom to educate lawyers, professors ought to ask for legally relevant arguments and demand carefully focused answers, the kinds of answers that judges expect during oral argument.[149] I have found that students often interpret a question about their views of the case as an invitation to talk about feelings and positions that are only tangentially related to the subject at hand.

Teaching the relevance of mistake as to consent in rape cases offers an illustration. Courts have divided on the law governing the relevance of a man's mistake of fact as to the woman's consent.[150] Following the advice laid out above, a

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[147] *See* MODEL RULES OF PROF'L. CONDUCT PREAMBLE (2006). The Preamble states:

> In the nature of law practice, however, conflicting responsibilities are encountered. . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Id.

[148] *See, e.g.*, Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 509 (1992); James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481, 481 (2002).

[149] *See supra* notes 140-42 and accompanying text.

[150] That issue was before the Supreme Judicial Court of Massachusetts on several occasions. *See* Commonwealth v. Ascolillo, 541 N.E.2d 570, 575 (Mass. 1989) (upholding the trial court's refusal to instruct the jury that an honest and reasonable mistake as to consent was a defense to rape); Commonwealth v. Sherry, 437 N.E.2d 224, 233 (Mass. 1982) (rejecting a claim that an honest but unreasonable mistake that the victim consent negated the *mens rea* of rape). *Cf.* Regina v. Morgan, (1976) A.C. 183 (H.L.) (holding that a good faith mistake negates

professor might ask for students to express their views on the subject. No doubt, the professor can generate a freewheeling discussion with some interesting points. In my experience, much of the discussion will be off the point and will fail to reinforce the need for rigorous analysis of precise legal issues.

When I taught the issue of consent, I had to push students hard to see that the relevance of mistake of fact has long standing roots in the criminal law, that the courts needed to interpret language in the rape statute, and that the effect of one interpretation might be to make the crime of rape a strict liability offense, despite the grading of the punishment as a crime of violence.[151] Long before I considered opening up the discussion to students' personal views, I found that I had to devote a great deal of time simply getting students to explicate the holdings of the cases and to see the very real difference between the results of following one rule as opposed to another. Many students would prefer to talk in broad theoretical terms about feminist theory and power relationships. It takes far less time and effort to form those kinds of opinions than it does to do the close reading and careful exegesis of the courts' opinions. But professors miss the opportunity to teach the essential skills needed for effective oral advocacy when they allow students to spend too much time discussing their views as opposed to legal analysis and reasoning.

Open-ended discussion of students' personal views may be affirming for students but it fails to focus the discussion and thereby fails to train them in critical oral advocacy skills.[152]

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the required *mens rea*) (U.K.).

[151] *Compare* State v. Christensen, 414 N.W.2d 843, 846 (Iowa App. 1987) (holding that because prior case law had established that "a defendant's knowledge of his or her partner's lack of consent is not an element" of the crime of rape, it follows that "a defendant's mistake of fact as to that consent would not negate an element of the offense."), *and* State v. Tague, 310 N.W.2d 209, 211 (Iowa 1981) (holding that despite the general disfavor of strict liability offenses, "[s]tatutes regarding sex offenses are common examples of employment of strict liability intended to protect the public welfare."), *with* People v. Mayberry, 15 Cal. 3d 143, 155 (1975) (arguing that the legislature most likely did not intend rape to be a strict liability offense because of the severe penalty and "serious loss of reputation following conviction").

[152] Without knowing how this lawyer was taught, this excerpt from the oral

Thus, affirming students may also be inappropriate for a second reason: too much concern about affirming students invites tolerance of superficiality. For example, even advocates of the gentler classroom who want to avoid embarrassing students, also recognize the importance of setting high academic standards.[153] A professor who adheres to the modern view of a gentler classroom and who invites freewheeling discussions of students' personal views may err on the side of allowing poor legal arguments in an effort to avoid hurting students' feelings.

A professor like Kingsfield showed no hesitation to bruise the ego of his students when they made poor legal arguments.[154] Critics have railed against the Kingsfields of the world for such boorish behavior.[155] But allowing students to make poorly reasoned arguments does not serve them or their future clients well. For example, in *The Paper Chase*, Professor Kingsfield shows little patience with Mr. Bell when Mr.

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argument in *United States v. Johnson* before the Seventh Circuit Court of Appeals is an excellent example of practicing attorneys thinking that their views and arguments deserve the court's time without a legally relevant basis:

> Judge Sykes: Any way to distinguish [Caballes]? I mean I understand that you object to the premise.
> Lawyer: I hope you can find one.
> Judge Bauer: Well, what you want us to do is overrule the Supreme Court.
> Lawyer: I want you to help me distinguish it, Judge. I am very disturbed.
> Judge Bauer: You can be disturbed on your own free time. Why are you intruding on mine?

Oral Argument Recording: Seventh Circuit Court of Appeals, Public Access to Oral Argument Recordings, 04-2732 : USA v. Johnson, Robert Lee, *available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-2732&submit=showdkt&yr=04&num=2732 (last visited Feb. 23, 2006).

[153] Hess, *supra* note 134, at 100 (advocating the importance of setting high expectations so that students have something to strive for and achieve).

[154] Vitiello, *supra* note 14, at 998-99 (recounting a scene in *The Paper Chase* where Professor Kingsfield rebukes Mr. Bell for a weak argument and pointing out that teachers do their students a disservice when they do not correct wrong behaviors or weak arguments in school because those traits will hurt the student and their clients when they appear in court after graduation).

[155] Lila A. Coleburn & Julia C. Spring, *Socrates Unbound: Developmental Perspectives on the Law School Experience*, 24 LAW & PSYCHOL. REV. 5, 19 (2000).

Bell argues that application of the Deadman's Statute is "unfair."[156] Students often appeal to such basic feelings of fairness in class. But leaving such "arguments" unchallenged does not serve students well, despite the fact that challenging such superficial statements may cause students to feel insecure or uncomfortable. Judges expect more than gut reactions.

A primary virtue of the Socratic method is that it challenges students' views and forces them to think more deeply than they may have done before attending law school.[157] Being challenged may be painful; it may cause us to realize that we are not as smart or as well prepared as we would like to believe. It may make us rethink our comfortable assumptions about the world. But as painful as that may be, the intellectual challenge posed by the rigorous application of the Socratic method is essential to training competent professionals.[158] Students, like lawyers, must be able to articulate opposing arguments if they want to be effective advocates. If that is morally numbing, so be it.

Today, I surmise that too much, not too little, time is spent soliciting students' views. Discussion of personal views may come at the expense of much more important lessons, including the ability to state with precision the holding and reasoning of complicated cases, competing arguments to the majority opinion, and the application of the court's ruling to new sets of facts. Some students may interpret the emphasis on the expression of personal opinions as an invitation to prepare poorly, because they are confident that they can talk about their own view of the subject rather than explicating the court's view.[159] By making class gentler or more fun, profes-

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[156] JOHN JAY OSBORN, JR., THE PAPER CHASE 127-28 (Special Anniversary ed., 2003).

[157] Stropus, *supra* note 14, at 465-68 (advocating for the use of the Socratic method as a needed bridge between undergraduate work and working in the legal field).

[158] *See, e.g.*, Stropus, *supra* note 14, at 470-72; Vitiello, *supra* note 14, at 987-91.

[159] As one of my upper level students said in class this past semester, when I asked him what the Supreme Court said, "I don't know what the Court thought, but what *I* think is . . ."

sors miss the opportunity to teach essential oral advocacy skills.

IV. CONCLUSION: WHERE DO WE GO FROM HERE?

My argument thus far begs a question: where do we go from here? Many of us recognize that law schools still provide inadequate training in oral advocacy.[160] But simply pointing out the problem is not especially helpful.

Programs like this symposium are encouraging. So too are clinical programs like the University of Mississippi's Criminal Appeals Program where faculty can teach meaningful advocacy skills. But schools often limit enrollment in clinics because clinics require a low student to faculty ratio to guarantee meaningful supervision.[161]

Judges have a significant role in educating the profession about the need for improved oral advocacy skills. Some judges educate the profession through their writings about advocacy.[162] Many judges volunteer their time by judging moot court competitions. However, at least according to Judge Kozinski, some of them are not forthcoming with the student advocates but instead play right into the conceit that student competitions are teaching the right stuff.[163] Judges who share Judge Kozinski's view of moot court would do well to end the charade and give more meaningful criticism of student advocates. Were prominent judges to award top honors to the advocate who stayed with the judges' questions and who entered into a meaningful dialogue, rather than trying to score debating points, and were those judges to explain their criteria, competition organizers and faculty involved in moot court programs would get the message.

Motivated professors can introduce oral advocacy into

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[160] I do not mean to suggest that we have gone far enough in teaching other skills. I suspect that we still have a ways to go in improving other skills.

[161] *See* MACCRATE REPORT, *supra* note 18, at 250-51 (discussing the high costs of live client clinics in light of the need to provide a low faculty-to-student ratio).

[162] *See generally* ALDISERT, *supra* note 45; Ginsburg, *supra* note 7; Rehnquist, *supra* note 7; Wiener, *supra* note 7.

[163] *See* Kozinski, *supra* note 62, at 178.

their classes through the use of simulation exercises.[164] My own hobby horse is to provoke a dialogue in the legal academy about whether we have been too quick to advocate in favor of kinder gentler legal education.[165] At a minimum, I hope that professors who use the Socratic dialogue explain to their students the essential skill that they are learning through the process. That explanation might make students less resistant to the method.[166]

These suggestions are at best incremental. For a wider impact, I would encourage the ABA to commission another study of oral advocacy training in our nation's law schools. Its previous study produced marked changes in advocacy programs.[167] But as indicated above,[168] law schools still have a way to go. Our study was necessarily limited in scope. An ABA study might examine programs at all accredited law schools. Additional resources might allow it to study more closely the content of the courses around the country to assess the quality of instruction. Among proposals that a committee might study is the need for mandatory oral advocacy training beyond the limited training now required at most schools.

Law schools would almost certainly pay attention to an ABA report and many schools would likely follow recommendations for upgrading advocacy training. Such an effort might result in better oral advocacy, with more lawyers who truly understand the role of oral argument and who attempt to engage in a meaningful dialogue with the bench.

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[164] *See, e.g.*, Myron Moskovitz, *From Case Method to Problem Method: The Evolution of a Teacher*, 48 ST. LOUIS U. L.J. 1205, 1206-08 (2004); Stephen J. Shapiro, *Teaching First Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 CREIGHTON L. REV. 245, 254-59 (2000) (describing how Professor Shapiro uses a series of problems and cases combined).

[165] Vitiello, *supra* note 14, at 956-58.

[166] If *Planet Law School* is typical, many students misunderstand the important skill that they are learning when a professor questions them thoroughly. ATTICUS FALCON, ESQ., PLANET LAW SCHOOL 27-31 (1998). I certainly did not fully appreciate the benefits from the experience until I began practicing law. Vitiello, *supra* note 14, at 971.

[167] *See supra* notes 35-60 and accompanying text.

[168] *See supra* Part III.

APPENDIX A

EVALUATION SHEET FOR ORAL ARGUMENTS

I. Substantive Content and Analysis
   A. Introduction
      1. Opening Statement
         Did you introduce yourself?
         Did you tell the court whom you represent?
         Did you tell the court the relief your client is requesting?
      2. Theme
         Did you start with a statement which, by weaving the applicable law and facts together, tells the judge what is at stake in your case?
      3. Road map
         Did you give the court in a few sentences a brief overview of how your argument will be organized?
   B. Argument
      1. Opening Statement
         Did you tell the court where your client stands on this issue and what your client wants?
      2. Organization
         Did you start with the strongest argument and continue in a logical and comprehensive manner?
      3. Support of Argument
         Did you make effective use of authority, reasoning, and policy to support your arguments?
      4. Application of Law to Fact
         Did you effectively apply the legal arguments to your client's situation?
      5. Response to Questions
         When the court asked a question, did you

first reply with a "yes" or "no"?
Did you then explain your answer?
Did you make a smooth transition back into your argument?

6. Conclusion
Did you concisely and effectively summarize your argument?

C. Closing
1. Theme
Did you briefly restate your theme and explain why you should win?
2. Relief requested
Did you state what you want the court to do?

II. Speech and Delivery
A. Volume
Was the court able to hear you?
B. Speed and Clarity
Was your speech clear and deliberate?
Did you vary the pace and pause occasionally?
C. Body Language
Did you maintain eye contact with the judge?
Did you use appropriate gestures for emphasis?
D. Verbal Language
Did you use correct vocabulary and grammar
Did you avoid excessive informality of speech
E. Notes
Did you present your argument without relying excessively on notes?

III. Overall Impression
A. Coherence
Was your argument well organized?
Was your argument logical?
B. Comprehensiveness
Was your argument thorough?
How well did you discuss and analyze the substantive issues?
C. Persuasiveness
Did you treat the court with respect?

Did your argument appeal appropriately to public policy, justice, and fair play?

Did you effectively maximize your strengths and minimize your weaknesses?

D. Time

Did you manage your allotted time effectively to enable you to present and support your major arguments?

Had you decided in advance how much time to spend on each issue?

Did you move from questions to arguments and from point to point with awareness of the time?

APPENDIX B

Table 1

School	Course Name	Req'd	Credits	Graded or P/F	Year taken	Students participating participating	Teams/Individ.
Tier 1							
Harvard	First Year Lawyering	y	2	p/f	1st	100%	teams
	Ames Moot Court Competition	y			1st	100%	teams
Notre Dame	Legal Research & Writing II	y	2		1st	100%	
	Moot Court - Appellate	n			upper		
Univ. of Arizona (Rogers)	Persuasive Communication	n	3	graded	upper		individuals
	Moot Court	n	2		upper		teams
	Moot Court Board	n	2		upper		teams
New York Univ.	Trial and Appellate Advocacy	no	3	graded	upper	small percentage	teams
	Appellate and Legislative Advocacy Work	no	2	graded	upper	small percentage	
	Federal Courts and the Appellate Process	no	4	graded	upper	limited to 16 students	both
Univ. of Michigan, Ann Arbor	Legal Practice II	yes	2	p/f	1st	100%	individual
	Criminal Appellate Practice Clinic	no	3	graded	upper	limited to 18 students	
Northwestern Univ.	Communication and Legal Research	yes	2	graded	1st	100%	individual
	Appellate Advocacy	no	2	graded	upper	25 students	individual
Georgetown Univ.	Appellate Practice Seminar	no	4	graded	upper	limited to 20 students	teams
	Appellate Litigation Clinic	no	9	graded	upper	18 students	
Univ. of Southern California	Legal Research Writing and Advocacy	yes	2	graded	1st	100%	individual
Univ. of California, Hastings	Moot Court	yes	2	p/f	1st	100%	individual
	Appellate Advocacy	no	2	graded	upper	small percentage; offered infrequently	teams
Univ. of Texas, Austin	Brief Writing and Oral Advocacy	no	2	graded	1st or 2nd	33%	individual
Boston Univ. (MA)	First Year Moot Court	yes		graded	1st	100%	individual
	Appellate Writing (seminar)	no			upper		
	Appellate Practice and Procedure	no			upper		
Brigham Young Univ. (UT)	Introduction to Advocacy	yes	2	graded	1st	100%	individual
	Advanced Appellate Brief Writing	no	2	graded	upper	limited to 14 students	
	Appellate Courts	no	2	p/f	upper		

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Table 1

School	Course Name	Req'd	Credits	Graded or P/F	Year Taken	Students participating	Teams/Individ.
Tier 2							
Loyla Univ. Chicago	Advocacy	y	2		upper	100%	
	Appellate Practicum	n	3		upper		individual
Univ. of Louisville (Brandeis) (KY)	Basic Legal Skills	y	3	graded	1st	100%	individuals
	Advanced App Ad - written only						
	Extramural Competitions	n	1 or 2	p/f	upper		teams
Univ. of the Pacific (McGeorge)	Appellate Advocacy	y	3	graded	upper	100%	individual
Univ. of Denver (Sturm)	Lawyering Process	y	4	graded	1st	100%	teams
	Appellate course (not always taught)	n	3	graded	upper	8 students	
	Appellate Clinic	n	3	graded	upper	8 students	
Mercer Univ. (GA)	Legal Writing II	y	3	graded	upper	100%	individuals
	Moot Court	n	3		upper		teams
Baylor Univ. (TX)	LARC III	yes	2	graded	1st	100%	teams
Temple Univ. (Beasley) (PA)	Legal Research and Writing	yes	3	graded	1st	100%	individual
	Appellate Advocacy	no	3-Jan	graded	upper		
Seattle Univ.	legal writing II	yes	3	graded	upper	100%	individual
	Appellate Advocacy	no	2	graded	upper	limited to 24 students	
Univ. of Nevada, Las Vegas	Lawyering process II	yes	3	graded	1st	100%	individual
Brooklyn Law School	Appellate Advocacy	no	2 to 3	graded	upper	42 students per semester	individual
	Legal Writing II	yes	1	graded	1st	100%	individual
	Appellate Review and Post-Conviction Re	no	2	graded	upper		none
Univ. of Nebraska, Lincoln	Appellate Advocacy	no		graded	upper	12 students every other year (less than 5%	individual
	Legal Research and Writing	yes		graded	1st	100%	individual
Univ. of Oklahoma	Legal Research and Writing	yes			1st	100%	

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Table 1

School	Course Name	Req'd	Credits	Graded or P/F	Year Taken	Students participating	Teams/Individ.
Tier 3							
Texas Tech.	Legal Practice	y	3	graded	1st	100%	
	Appellate Advocacy	n	1		upper		
	TX Trial and Appellate Procedure	n	3		upper		
Univ. of Idaho	Legal Research & Writing	y	3	graded	1st	100%	individuals
	Moot Court	n	2	p/f	upper	40%	teams
	Appellate Advocacy Clinic	n	6	graded	upper	2 to 8 students (of 100)	teams
Univ. of Memphis (Humphries)	Legal Method II	y	1	graded	1st	100%	teams
	Legal Argument & Appellate Practice	n	3	graded	upper	12 students a year/150 in class	both
Vermont Law School	Legal Writing II	y	3	graded	1st	100%	individuals
	Appellate Advocacy	y	3	graded	upper	100%	individuals
Willamette Univ. (Collins)	Legal Research and Writing	y	4	p/f	1st	100%	both
Stetson Univ. (FL)	Research and Writing II	yes	3	graded	1st	100%	
	Appellate Practice and Procedure	no	3	graded	upper	small percentage (18 students)	individual
Franklin Peirce (NH)	Legal Skills II	yes	3	graded	1st	100%	
	Clinic	no	2	pass/fail	upper		
Gonzaga Univ. (WA)	Research and leagal writing IV	yes	1		upper	100%	
Howard Univ. (DC)	Legal Writing II	yes	2	graded	upper	100%	both
	(class 2)	no	3				
Univ. of Akron (OH)	Appellate Advocacy	yes	1			100%	
	Legal Analysis, Research and Writing	yes	5	graded	1st	100%	
Univ. of Arkansas -- Little Rock	Reasoning, Writing, and Advocacy II	yes	2	graded	1st	100%	individual
	Advanced Appellate Advocacy	no	2	graded	upper		individual
	Moot Court	no			upper		competition team
Univ. of San Francisco	Moot Court	yes	1	p/f	1st	100%	individual

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Table 1

School	Course Name	Req'd	Credits	Graded or P/F	Year Taken	Students participating	Teams/Individ.
Tier 4							
University of Dayton (OH)	Legal Professions I/II/III	n	8		1st or 2d		
	Moot Court Interschool Competition	n	2		upper		
Univ. of Detroit (Mercy)	Applied Legal Theory & Analysis	y	6	graded	1st	100%	individuals
	Advanced Advocacy I	n	2	graded	upper		
Chapman Univ. (CA)	Lawyering Skills - AppAd						
South Texas College of Law	Legal Research and Writing II	yes	2	graded	1st	100%	
	Appellate advocacy	no	1	p/f	upper		
John Marshall (IL)	Lawyering Skills III	yes	3	graded	1st	100%	
	Appellate Procedure	no	2				
Pace Univ. (NY)	Advanced Appellate Advocacy	no	2	graded	upper	limited to 16 students	individuals
	Criminal Law Analysis and Writing	yes	3	graded	1st	100%	
Golden Gate Univ. (CA)	Appellate advocacy	yes	2	graded	upper	100% (10 sections per semeter of 14 students each)	
Valparaiso (IN)	Legal Writing and Appellate Advocacy	yes	2	graded	1st	100% (4 sections) individuals	
	Advanced Appellate Advocacy: Civil	no	2	graded	upper	limited	
	Advanced Appellate Advocacy: Criminal	no	2	graded	upper	limited	

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Table 2

School	Course Name	Instructor			Faculty Appellate Advocacy Experience
		Students	Tenure-Track	Non T-T	
Tier 1					
Harvard	First Year Lawyering	y	y	y	
	Ames Moot Court Competition				
Notre Dame	Legal Research & Writing II		y	y	
	Moot Court - Appellate			y	yes
Univ. of Arizona (Rogers)	Persuasive Communication		y	y	yes
	Moot Court	y		y	
	Moot Court Board			y	
New York Univ.	Trial and Appellate Advocacy			y	yes; Siffert:19 Federal App Cases, Sotomayor: present for 150 app cases
	Appellate and Legislative Advocacy Workshop		y		guest speakers are very experienced in the specific type of law
	Federal Courts and the Appellate Process			y	sitting circuit court judge
Univ. of Michigan, Ann Arbor	Legal Practice II			y	ranges from clerking experience to actual app ad experience
	Criminal Appellate Practice Clinic			y	
Northwestern Univ.	Communication and Legal Research			y	limited
	Appellate Advocacy			y	
Georgetown Univ.	Appellate Practice Seminar			y	Clerk to Sup Ct Justice, Highly Experienced in App Ad (35 entries in west law fed)
	Appellate Litigation Clinic		y		Was Member of committee that issued ABA report; has argued 4 Fed App cases for the clinic
Univ. of Southern California	Legal Research Writing and Advocacy			y	lots of app ad experience
Univ. of California, Hastings	Moot Court			y	limited
	Appellate Advocacy	y		y	extensive
Univ. of Texas, Austin	Brief Writing and Oral Advocacy			y	
Boston Univ. (MA)	First Year Moot Court			y	
	Appellate Writing (seminar)		y		
	Appellate Practice and Procedure				
Brigham Young Univ. (UT)	Introduction to Advocacy		y	y	
	Advanced Appellate Brief Writing		y		
	Appellate Courts				

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Table 2

School	Course Name	Instructor			Faculty Appellate Advocacy Experience
		Students	Tenure-Track	Non T-T	
Tier 2					
Loyla Univ. Chicago	Advocacy			y	extensive
	Appellate Practicum				yes
Univ. of Louisville (Brandeis) (KY)	Basic Legal Skills		3		some
	Advanced App Ad - written only				
	Extramural Competitions		y		
Univ. of the Pacific (McGeorge)	Appellate Advocacy		y		yes
Univ. of Denver (Sturm)	Lawyering Process		y	y	yes
	Appellate course (not always taught)		y		
	Appellate Clinic		y		
Mercer Univ. (GA)	Legal Writing II		y		
	Moot Court	y	y		
Baylor Univ. (TX)	LARC III		y		limited
Temple Univ. (Beasley) (PA)	Legal Research and Writing			y	limited (clerking experience)
	Appellate Advocacy				
Seattle Univ.	legal writing II			y	limited
	Appellate Advocacy			y	
Univ. of Nevada, Las Vegas	Lawyering process II			y	Clerk to 9th Circuit
Brooklyn Law School	Appellate Advocacy			y	limited (clerking)
	Legal Writing II		y	y	6 of 17 have some appellate litigation experience
	Appellate Review and Post-Conviction Remedies		y		
Univ. of Nebraska, Lincoln	Appellate Advocacy		y		
	Legal Research and Writing			y	
Univ. of OK	Legal Research and Writing				

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Table 2

School	Course Name	Instructor			Faculty Appellate Advocacy Experience
		Students	Tenure-Track	Non T-T	
Tier 3					
Texas Tech.	Legal Practice				some profs.
	Appellate Advocacy		y		
Univ. of Idaho	TX Trial and Appellate Procedure				
	Legal Research & Writing		y		yes
	Moot Court		y		yes
	Appellate Advocacy Clinic		y		
Univ. of Memphis (Humphries)	Legal Method II		y	y	yes
	Legal Argument & Appellate Practice		y		yes
Vermont Law School	Legal Writing II		y	y	
	Appellate Advocacy			y	
Willamette Univ. (Collins)	Legal Research and Writing			y	not all
Stetson Univ. (FL)	Research and Writing II			y	very limited
	Appellate Practice and Procedure			y	extensive appellate experience
Franklin Peirce (NH)	Legal Skills II				
	Clinic				
Gonzaga Univ. (WA)	Research and leagal writing IV			y	at least one instructor has experience
Howard Univ. (DC)	Legal Writing II			y	
	(class 2)				
Univ. of Akron (OH)	Appellate Advocacy			y	
	Legal Analysis, Research and Writing			y	
Univ. of Arkansas, Little Rock	Reasoning, Writing, and Advocacy II			y	some of the four professors
	Advanced Appellate Advocacy			y	yes
	Moot Court				
Univ. of San Francisco	Moot Court	y	y		

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Table 2

School	Course Name	Instructor			Faculty Appellate Advocacy Experience
		Students	Tenure-Track	Non T-T	
Tier 4					
University of Dayton (OH)	Legal Professions I/II/III			y	
	Moot Court Interschool Competition				
Univ. of Detroit (Mercy)	Applied Legal Theory & Analysis		y	y	some
	Advanced Advocacy I				
Chapman Univ. (CA)	Lawyering Skills - AppAd				
South Texas College of Law	Legal Research and Writing II			y	limited
	Appellate advocacy				
John Marshall (IL)	Lawyering Skills III			y	lots of clerking experience
	Appellate Procedure				
Pace Univ. (NY)	Advanced Appellate Advocacy		y		yes
	Criminal Law Analysis and Writing		y		one of four profs has app. litigation exp.
Golden Gate Univ. (CA)	Appellate advocacy		y	y	yes
Valparaiso (IN)	Legal Writing and Appellate Advocacy	y	y		
	Advanced Appellate Advocacy: Civil		y		
	Advanced Appellate Advocacy: Criminal		y		

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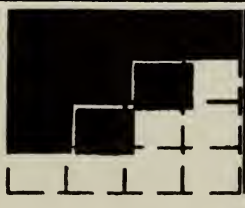

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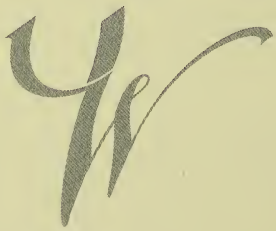

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